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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

17

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VOLUME IV.

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OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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HON. SAMUEL S. WILDE,
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. RICHARD FLETCHER,
} JUSTICES.

ATTORNEY GENERAL,

HON. JOHN H. CLIFFORD.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF HAMPSHIRE, FRANKLIN AND HAMPDEN, SEPTEMBER TERM 1849, AT NORTHAMPTON

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE,
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. RICHARD FLETCHER,
} JUSTICES.

[The cases from the county of Franklin, commencing on page 114, were argued at the sittings in Boston, in January, 1850.]

AUSTIN SMITH, Administrator, *vs.* THE PRESIDENT, DIRECTORS & COMPANY OF THE NORTHAMPTON BANK.

Where bank shares are seized and sold by a collector of taxes, in the manner provided by the act of 1846, *c.* 195, on a warrant from assessors having jurisdiction of the subject matter, and *prima facie* a lawful authority to issue such warrant, and there is nothing on the face of the proceedings to indicate any want of jurisdiction, or any error or defect therein; the cashier of the bank is authorized (if not required) to issue a new certificate of such shares to the purchaser, who will thereupon become entitled to accruing dividends, whether the tax, for the payment of which the shares are sold, be rightly assessed or not.

In December, 1845, O. S. died, leaving a will, in which A. S. was named as executor, by whom the will was presented for probate; but the validity thereof being

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controverted, A. S., in December, 1846, was appointed special administrator; and the validity of the will being established in August, 1847, A. S. was appointed executor under the same: The assessors of the town of H., in which the deceased last dwelt, having assessed a tax to A. S., in May, 1846, for the estate of O. S. in his hands as executor, it was held, that under the peculiar circumstances of the case, the same was rightly assessed.

This action was brought by the plaintiff, as the special administrator of the estate of Oliver Smith, late of Hatfield, deceased, for the recovery of the dividends on certain shares in the capital stock of the defendants, which had been seized and sold, as the defendants alleged, for taxes, by a collector of Hatfield, before the dividends in question had accrued.

On the trial, which was in the court of common pleas, before *Wells*, C. J., it was in evidence, or admitted, that Oliver Smith died at Hatfield in December, 1845, having made a will by which he appointed the plaintiff executor and trustee; that, the validity of the execution of the will being contested in the probate court, the plaintiff was appointed special administrator in December, 1846; that, the will being subsequently established, the plaintiff was duly appointed executor thereof, in August, 1847; that, previous to his appointment as special administrator, the plaintiff sold a few hundred dollars worth of the personal estate of the testator, such sale being for the benefit of the estate, and sanctioned by those interested, so far as their assent could be obtained; that a tax was assessed by the assessors of Hatfield upon the estate of Oliver Smith, in May, 1846; and that certain shares in the capital stock of the defendants were seized and sold to pay the same in the months of February and March, 1847.

The writ was dated May 24th, 1847; and it was admitted, that the dividends sued for had been regularly demanded by the plaintiff, previously to the commencement of the action.

The defendants filed a specification of their defence, which was admitted as a statement of facts, and from which it appeared, that, on or about the 27th of February, 1847, the collector of taxes for the town of Hatfield certified to the defendants' cashier, that he had seized seventeen shares

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of their capital stock belonging to the estate of Oliver Smith, deceased, for the payment of a tax in his hands for collection against the personal estate of said deceased, in the hands of Austin Smith, special administrator, and executor and trustee under his will, and amounting to the sum of $1602, being the town and county tax assessed upon said estate, said Austin having refused to pay the same; that this certificate was made on an attested copy, under the hand of the collector, of the warrant issued to him, on which the shares were seized; that the attested copy so left with the defendants' cashier purported to be a copy of a legal warrant duly issued by the assessors of the town of Hatfield, for the collection of taxes; that, afterwards, on the 5th of March following, the collector left with the officer of the defendants, whose duty it was to record transfers of shares, an attested copy of the said warrant, and of his return thereon; that from the collector's return, it appeared, that fourteen of the shares were seized on the warrant, and sold in the manner and subject to the rules prescribed by law for the sale of goods by collectors of taxes in like cases, namely: the said Austin having refused to pay the tax after demand previously made, the collector, on the said 27th of February, gave notice of the sale of the said fourteen shares, by posting up a notification thereof at the store of Josiah Brown, a public place in Hatfield, and on the 5th of March following sold the same at public auction to Nancy Dickinson, she being the highest bidder therefor, for the sum of $119 a share, amounting in the whole to the sum of $1696, leaving an overplus to be returned of $42·86, after payment of the taxes and charges of collection; and that the said fourteen shares were afterwards, on the 25th of March, transferred to Nancy Dickinson, the purchaser, and a certificate thereof made to her.

The specification of defence also set forth a like seizure and sale of other six shares of the capital stock of the defendants belonging to the estate of Oliver Smith, for the payment of taxes due therefrom.

It appeared, that the taxes in question were assessed to

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"Austin Smith who is named as executor of an instrument purporting to be the last will and testament of Oliver Smith, late of Hatfield, deceased, for the estate of the said deceased, in the hands and possession of the said Austin Smith."

It appeared, further, that the assessors and collector of the town of Hatfield for the year 1846, were regularly chosen and duly sworn; that the taxes in question were regularly entered on the tax list against Oliver Smith's estate; that the warrant of the assessors to the collector, and his returns and doings thereon, were in due form; and the handwriting of the collector, and his acting as such *de facto*, were not denied.

The dividends sued for were declared in April, 1847, and were paid by the defendants to the purchasers of the shares at the collector's sale.

The presiding judge being of opinion, that upon these facts the plaintiff was entitled to recover, the jury returned a verdict in his favor, and the defendants thereupon alleged exceptions.

W. Allen, Jr., for the defendants.

I. The leaving of the copies of the warrants and returns with the defendants, by the collector, justified them in paying after accruing dividends to the purchasers therein named. *Waldron* v. *Lee*, 5 Pick. 323; *Stedman* v. *Eveleth*, 6 Met. 114. Even if the collector exceeded his power in making the sale, as he had jurisdiction of the subject matter, his return is conclusive in favor of the bank. *Nichols* v. *Thomas*, 4 Mass. 234, by Parsons, C. J.; *Wilmarth* v. *Burt*, 7 Met. 257; *Upton* v. *Holden*, 5 Met. 360; *Albee* v. *Ward*, 8 Mass. 79, 85, 86, and cases cited. The act required of the bank by the statute is a mere formal act, to give effect to the act of the collector. See Rev. St. *c.* 97, § 39. There being no bad faith or want of diligence shown, the defendants will not be charged by reason of a want of jurisdiction appearing on the face of the papers, unless it be a clear case. *Cary* v. *Daniels*, 5 Met. 236.

II. The tax was rightly assessed to the plaintiff: 1. Be-

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cause the property was in his possession. Rev. Sts. *c.* 8, § 5; *Tyler* v. *Hardwick*, 6 Met. 470; Rev. Sts. *c.* 7, §§ 2, 4; *Cook* v. *Leland*, 5 Pick. 236. If the plaintiff was not liable to be taxed for this estate, still, being an inhabitant of Hatfield, liable to be taxed there to some extent, his only remedy was by application for an abatement. Rev. Sts. *c.* 7, §§ 19, 23, 24. He is the same "person," although called "executor" or "trustee." *Osborn* v. *Danvers*, 6 Pick. 98. He would be authorized to pay out of the estate taxes assessed on him by virtue of his being in possession. Rev. Sts. *c.* 64, §§ 11, 12; *Stearns* v. *Stearns*, 1 Pick. 157; *Mitchell* v. *Lunt*, 4 Mass. 654; *Shillaber* v. *Wyman*, 15 Mass. 322. 2. As special administrator, he had authority to pay the taxes. Rev. Sts. *c.* 64, §§ 6–10. 3. As executor and trustee under the will, he had authority to pay the tax, either by relation from his subsequent qualification as executor; *Jewett* v. *Smith*, 12 Mass. 309; *Shillaber* v. *Wyman*, 15 Mass. 322; *Andrews* v. *Gallison*, 15 Mass. 325; *Wilson* v. *Shearer*, 9 Met. 504; 23 Pick. 129; Rev. Sts. *c.* 64, § 5; *c.* 63, § 2; or because the property vested in him at the instant of the testator's death. 1 Dane's Ab. *c.* 29, *art.* 2, § 2; Bac. Ab. Executor, E. 14; Com. Dig. Administrator, B. 9; *Johns* v. *Johns*, 1 McCord, 132; *Seabrook* v. *Williams*, 3 McCord, 371; *Strong* v. *Perkins*, 3 N. H. 517; *Judson* v. *Gibbons*, 5 Wend. 224.

III. The sale of the shares was lawful. *St.* 1846, *c.* 195; Rev. Sts. *c.* 97, § 36; *St.* 1804, *c.* 83, § 1; *St.* 1843, *c.* 98; Rev. Sts. *c.* 38, § 16; *c.* 8, §§ 3, 7, 32, 33; *St.* 1785, *c.* 50, § 6; Rev. Sts. *c.* 8, § 15; *Crapo* v. *Stetson*, 8 Met. 393; *Jewett* v. *Smith*, 12 Mass. 309; *Wilson* v. *Shearer*, 9 Met. 504; *Rockwood* v. *Allen*, 7 Mass. 254; *Grosvenor* v. *Gold*, 9 Mass. 209; *Williams* v. *Holden*, 4 Wend. 223; Rev. Sts. *c.* 7, §§ 9, 10.

C. Delano, for the plaintiff.

I. In this commonwealth, there is no power to tax a dead man's estate, until after the appointment of his executor or general administrator. Whatever power exists to tax or to collect taxes, must result from statute. *Crapo* v. *Stetson*, 8 Met. 393; *Andover & Medford Turnpike* v. *Gould*, 6 Mass.

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40, 44; *Caldwell* v. *Eaton*, 5 Mass. 399, 403. Rev. Sts. *c.* 7, § 10, *cl.* 7, providing that "personal estate in the hands of executors or administrators, *undistributed*, shall be assessed *to the* executors and administrators," not only implies that the estate is in process of distribution, as well as in the hands of an executor or administrator capable of making distribution, but requires the assessment to be directly to the executor or administrator, thus capable. There must be some representative of the estate, "having an opportunity to furnish a list of taxable property to the assessors;" *Cook* v. *Leland*, 5 Pick. 236; and through whom the collector can enforce payment of the tax; which must be either by action or distress. 1. A special administrator, at least prior to 1848, was not liable to an action for a tax. Rev. Sts. *c.* 64, § 10; Rev. Sts. *c.* 68, § 1; and this case is not within Rev. Sts. *c.* 8, § 15; *St.* 1789, *c.* 4, under which *Cook* v. *Leland* was decided. Previously to the revised statutes, a special administrator bore the closest analogy to the administrator *pendente lite* of the English law; he was authorized to pay debts and liable to suits for not paying them. *St.* 1834, *c.* 174; 1 Sch. & Lef. 254; *Woollaston* v. *Walker*, 2 P. Wms. 576. But under the revised statutes he is a mere receiver "to collect and preserve" deceased's estate. Rev. Sts. *c.* 64, §§ 6–9, and commissioners' notes; Williams, Off. Ex. *c.* 14; 2 Inst. 398. *St.* 1848, *c.* 235, is a legislative declaration that no power to sue special administrators for taxes existed previously. 2. This tax could not be enforced by distress. He is not a "stockholder," nor can he be deemed guilty of a "neglect and refusal" to pay; for he has no power to adjust priorities; *Wilson* v. *Shearer*, 9 Met. 504; nor can he decide upon the amount of "debts due to the estate more than it is indebted for," within the Rev. Sts. *c.* 7, § 4.

St. 1848, *c.* 235, was evidently intended by the legislature to cure the defect in the Rev. Sts. *c.* 8, § 15, as to the collection of a tax "lawfully assessed," after the decease of the testator, and does not extend to special administrators; and the proviso in the statute, that it shall not affect legal priorities, prevents its operating on such administrators.

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II. If the bank, having the option to surrender the shares or not, do surrender them ill advisedly at the demand of third persons, it does so at its peril. The only person entitled to justify under legal process is an officer of the law; and in order to justify him, the precept must issue from a lawful jurisdiction; it must be on its face apparently lawful; and it must be executed in a regular and lawful manner. *Sanford* v. *Nichols*, 13 Mass. 286, 288; *King* v. *Whitcomb*, 1 Met. 328, 331; *Stetson* v. *Kempton*, 13 Mass. 272, 282; *Upton* v. *Holden*, 5 Met. 360, 362; *Wilson* v. *Shearer*, 9 Met. 504; *Nichols* v. *Thomas*, 4 Mass. 232. The English law of poor rates is analogous. By Sewall, J., in *Colman* v. *Anderson*, 10 Mass. 105, 118. Yet if a poor rate has been charged upon property not taxable, the justice granting the warrant of distress, and the collector executing it, are both liable. *Neave* v. *Weather*, 3 Ad. & El. N. S. 984. Even if the bank were entitled to the same immunity as the collector, it would not be justified in this case, for the assessment, as recited on the face of the warrant and certificate, purports to be on a dead man's estate, and does not purport to be directly against any person living. So that it appeared on the face of the papers not only that the distress, but also the tax itself, was illegal; and both collector and bank were bound to know the law. The bank is not entitled to the immunities which an officer of the law may sometimes claim, but is bound to ascertain and take notice of all defects, from the assessment down to the distress and sale, whether apparent or latent. *St.* 1846, *c.* 95; Rev. Sts. *c.* 97, § 36, *et seq.*; *c.* 90, § 36, *et seq.*; *Russell* v. *McLellan*, C. C. Oct. T. 1848. *Chase* v. *Merrimack Bank*, 19 Pick. 564, where the point now contended for was not even raised. *Howe* v. *Starkweather*, 17 Mass. 240; *Titcomb* v. *Union Ins. Co.* 8 Mass. 326; Parsons, C. J., in *Caldwell* v. *Eaton*, 5 Mass. 399, 404.

The doctrine of relation will not be so applied as to take away the rights of the intestate. Co. Lit. 150, *a*; *Leber* v. *Kauffelt*, 5 W. & S. 440, 445. It makes no difference that the special administrator was finally appointed executor. *Stratton* v. *Ford*, 2 Lee, 49. The Rev. Sts. *c.* 8, § 5, cannot

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apply where the person intended to be taxed had no right to intermeddle with the estate. It is true that an executor *may* do many things, but he does them all at the peril of being able to prove the will, and therefore he is *obliged* in law to do nothing. And if he has intermeddled and does not prove the will, the law deems him a wrong-doer, capable of purging such acts only as are clearly beneficial to the estate. Except with reference to future ratification by being clothed with legal authority, the plaintiff had none of the rights or liabilities of a stockholder.

C. P. Huntington, in reply.

If it be true that the estate had no legal representative, and therefore could not be taxed, then any executor, by neglecting to prove the will until after the 1st of May, might shield the estate from taxation.

I. The estate was legally assessed. Mass. Const. *c.* I. § 1; Rev. Sts. *c.* 7, §§ 1, 10, *cl.* 7; *Cook* v. *Leland*, 5 Pick. 236. There was no person here capable of furnishing a list. The tax might even have been assessed against an executor *de son tort*. Rev. Sts. *c.* 64, §§ 11, 12. See also Plym. Col. Laws, *c.* 7, § 12, *p.* 268; Anc. Char. 696. If this were a tax assessed before the death of the testator, the reasoning of the court in *Wilson* v. *Shearer* might apply; but being assessed after the death, it is to be treated as an expense of administration, or as a lien or incumbrance on the estate, which his power to collect and preserve the effects would authorize him to pay off. *St.* 1823, *c.* 144, § 1; Rev. Sts. *c.* 66, § 24, and commissioners' notes. The form of bond required by the Rev. Sts. *c.* 64, § 7, shows that a special administrator has power to hand in a list, make schedules, take an inventory, and strike a balance between "bills receivable and bills payable," under the Rev. Sts. *c.* 7, § 4. His exemption, under Rev. Sts. *c.* 64, § 10, from actions by creditors of the deceased, does not extend to taxes imposed after the death of the latter. It is no objection that the warrant names him executor. Rev. Sts. *c.* 8, § 5; *Tyler* v. *Hardwick*, 6 Met. 470.

II. The bank shares were liable to seizure on the warrant.

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A special administrator, who after notice and demand refuses to pay, is guilty of a "neglect and refusal" within the *St.* 1846, *c.* 195. The plaintiff was a trust stockholder of the shares seized on the warrant.

III. The collector was justified by his warrant. *Colman* v. *Anderson*, 10 Mass. 105, 118; *Sanford* v. *Nichols*, 13 Mass. 286, 288; *Waldron* v. *Lee*, 5 Pick. 323, 328; *Sprague* v. *Bailey*, 19 Pick. 436; *Wilmarth* v. *Burt*, 7 Met. 257.

IV. The bank were bound to issue the certificates to the purchaser. Rev. Sts. *c.* 97, § 39; *St.* 1846, *c.* 195, § 2; *Sargent* v. *Franklin Ins. Co.* 8 Pick. 90, 97, 100; *Howe* v. *Starkweather*, 17 Mass. 240, 244; *Hussey* v. *Manuf. & Mech. Bank*, 10 Pick. 415, 420; *Plymouth Bank* v. *Norfolk Bank*, 10 Pick. 454, 459; *Quiner* v. *Marblehead Ins. Co.* 10 Mass. 476. In *Chase* v. *Merrimack Bank*, the point was obviously waived, for the purpose of getting a decision on the main question. *Titcomb* v. *Union Ins. Co.*, *Caldwell* v. *Eaton*, and *Russell* v. *McLellan* were all cases involving the regularity of the proceedings of the officer, and not applicable.

Shaw, C. J.* This is an action of assumpsit brought by Austin Smith, as special administrator of the goods and estate of Oliver Smith, deceased. The suit was commenced in May, 1847, after the will of Oliver Smith, by which the plaintiff was appointed executor, had been offered for probate, and previous to August, 1847, when it was finally proved and allowed.

The action is brought to recover the dividends on certain shares in the capital stock of the defendants which were declared in April, 1847. The actual sum demanded in this suit is a small one, being only one semiannual dividend; but the question involves the title to the shares themselves. These shares had been sold under the circumstances stated in the bill of exceptions, at some time previous to the declaration of this dividend; and certificates had been issued to the purchasers, to whom the dividend was paid; and the first question is, whether the sales were rightful, and transferred

* Mr. Justice Dewey did not sit in this cause.

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the property in such shares to the purchasers. If they did, of course, the plaintiff is not entitled to recover; for if he were, it would follow, that the defendants might be legally liable to two different parties, at the same time, for dividends on the same shares.

The defendants contend, that they have no means of knowing whether the tax was rightly assessed or not, and are not bound to litigate that question. On the contrary, we are pressed with the consideration, that, unless an owner can hold the bank responsible, a tax may be assessed upon any man, without right, and he be divested of his property by the doings of an executive officer, without notice.

The question is certainly not without difficulty; but the difficulty is rather theoretic than practical; inasmuch as there must be a demand made for the tax, which will put the owner on his guard, and perhaps enable him to take measures for his relief.

In the present case, the taxes were assessed in May, 1846, to "Austin Smith, who is named as executor of an instrument, purporting to be the last will and testament of Oliver Smith, late of Hatfield, deceased, for the estate of the said deceased, in the hands and possession of the said Austin Smith." It would appear, *prima facie*, that this was a good assessment to Smith, as executor, and the warrant followed the assessment.

By the statute of 1846, *c.* 195, the collector has the same authority to take bank shares, as he has to take goods, for the payment of taxes, and to dispose of and sell the former, in the same manner, as by law the latter are directed to be sold. The purchaser is then entitled to a certificate in the same manner as when a sale of bank shares is made on execution. It appears, by the return of the officer, that he gave due notice to the cashier of his having seized the shares after an ineffectual demand on the plaintiff for the tax; that he left a certified copy of his warrant with the cashier; and that he advertised and sold the shares, and again left a certificate of that fact, with an attested copy of his warrant and return, with the officer whose duty it was to record the

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transfer of shares, namely, the cashier. The statute also provides, that upon such proceedings being had, and such certificates left, the purchaser shall be entitled to a certificate of the shares purchased in due and proper form. Such certificates were given, and the court are of opinion, that the officer of the bank having complied with the directions of the law, the defendants, the bank, in order to defend themselves against this claim, are not bound to go further and show that the tax in question was rightly assessed to the plaintiff as such executor.

The collector had an apparently good warrant of distress. It emanated from a board of assessors having lawful authority to issue it, that is, having jurisdiction of the subject matter, and *prima facie* a lawful authority; and there was nothing on the face of the documents to indicate any want of jurisdiction, or any error or defect in the proceedings. It seems, therefore, to this court, that this was a case, in which, if the cashier of the defendants was not bound to issue the new certificates to purchasers, he was at least authorized to do so; and, therefore, that the defendants were not liable to pay the dividends to the plaintiff, and that this action against the bank cannot be maintained.

The other question, whether this tax was rightly assessed by the assessors of Hatfield, was argued much at large; and the court have been somewhat urgently pressed to express an opinion upon it, though not, perhaps, in strictness, necessary to the decision of the present case. The question is one of great doubt and difficulty; and one which affects the interest of parties not in form before the court; though, it is probable, that they are in fact represented. It was stated in the argument, that the defendants in this action had been indemnified; though it was not stated by what party, nor does any fact of that sort appear in the record. Under these circumstances, I am instructed to express the opinion of a majority of the court, (one member not sitting in the cause,) an opinion formed not without some hesitation, that, under the peculiar circumstances of the present case, the tax was rightly assessed to the present plaintiff, as the executor of Oliver Smith's will.

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It may be well admitted, that the liability of property to taxation in this commonwealth depends upon the provisions of statutes; but the statutes upon this subject, like all others, must be construed with a reference to the reasons and principles of the common law, and with a just regard to the subject matter to which they apply.

The general policy of the law is, that all property, not specially exempted, shall be subject to taxation. Rev. Sts. c. 7, § 2. And it is equally clear, that property of deceased persons, whilst in the process of administration, and in the hands of executors and administrators, is not thus exempted. Rev. Sts. c. 7, §§ 5 and 10, *cl.* 7. It is no doubt true, in this as in many other cases of statute provisions, that the legislature had in view the more usual and common case, of estates of deceased persons in the hands of executors and administrators, where administration has been actually granted, or the will admitted to probate, and letters testamentary issued thereon. But, without expressing any opinion, in regard to letters of administration, where the administrator derives his authority from the letter of administration, neither the letter nor the reason of the law applies to executors, who derive their authority from the will, and where probate is necessary only to give authenticity to the will. Property of the testator is in the legal custody of the executor before probate, and he may exercise many of the powers of an owner over it. Property so situated may be the subject of larceny. Even where there is no will, the property of a deceased person is not derelict; but is regarded in law as the property of the administrator subsequently appointed, by relation from the time of the decease, so that taking it by any one, *animo furandi*, is larceny. *Wonson* v. *Sayward*, 13 Pick. 402.

It is urged, that the executor could not give in a list, &c. A list is not necessary to the validity of the tax; but we cannot perceive why the executor could not give in a list. He had the actual and legal custody of the property, and the securities and evidence of property.

But without laying down any rules of more general application, we confine our opinion to the circumstances of the

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present case, which are certainly very peculiar. The testator died in December, 1845. The present plaintiff, Austin Smith, was named sole executor and trustee. The will was offered for probate, prior to the assessment of the tax, by the executor, who thereby authoritatively expressed his assent to the will, confirmed by his subsequent appointment. Before any step was taken towards laying or collecting the tax, the executor was appointed special administrator. If he was at that time vested with the power of paying, and whether or not a payment at that stage would have been regarded as the payment of a preferred debt, having a legal priority, or as an incidental expense, it was in the power of such special administrator to take all needful measures to guard and protect the estate from unjust claims. If the estate was liable, then it was a necessary expense, which he might pay and charge as such; if it was not liable, he might protest against the levy, until the will should be proved. If upon protest and notice to the collector, to the assessors, and to the town for whose benefit the tax was assessed, the collector had persisted in making a distress before the will could be proved, and the estate regularly placed under the administration of an executor or administrator, and such distress were likely to be attended with a great sacrifice of property by a sale at an under value, we are inclined to the opinion, that the special administrator might have paid the tax under protest, as a necessary incidental expense for the preservation of the property, to be recovered back afterwards of any party liable, in case the tax was not rightfully assessed.

But, whether this were so or not, it appears, in the present case, that when the tax was assessed, the plaintiff was named executor and had offered the will for probate; that before it was levied he was appointed special administrator; and that subsequently the will was admitted to probate. The plaintiff was then confirmed as executor, and obtained letters testamentary; and whatever may have been the extent and limits of his power before probate, this act relates back and proves that the property was in him from the time of the decease of the testator; so that in May, 1846, the

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property was in his hands as executor, and not distributed, and was consequently liable to be assessed in the manner in which it was assessed to Austin Smith as executor. It was personal property of a deceased person in the hands of an executor and not distributed, and was assessed to the executor, in the town where the deceased last dwelt; and it was within the letter, and, in our opinion, within the meaning and true construction of the statute. Rev. Sts. *c.* 7, § 10, *cl.* 7.

This case comes to this court upon exceptions from the court of common pleas, where, under the direction of the court, a verdict was taken for the plaintiff. The effect of our view of the law is to sustain the exceptions, and to set aside the verdict. But as the opinion goes to the whole merits of the case, and shows that the plaintiff cannot recover, I suppose it is proper for the plaintiff to consent to a nonsuit. But, if otherwise, the entry here must be, that the verdict be set aside, and a new trial had in this court.

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151 411
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152 464
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158 291
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185 1481
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190 1471

Erick W. Dexter *vs.* William Manley.

In a lease for years of real estate, comprising a factory, water power, tools, machinery and apparatus, for carrying on a particular branch of manufacture, there is an implied covenant, on the part of the lessor, that the lessee shall have the free and peaceable enjoyment of the premises during the term, so as to enable him to make use thereof for the purposes for which they are intended, without any interruption or disturbance by the lessor.

In a declaration on the covenant for quiet enjoyment implied by law in a lease for years, the covenant is sufficiently described, if it be stated according to the legal effect of the instrument.

Where a lease for years of a factory, with water power, tools, machinery and apparatus for the manufacture of pails, contained a reservation in favor of the lessor of one room in the factory, and the privilege of running a turning lathe and saw therein during the term; and the lessee brought an action of covenant broken against the lessor, for a misuse of the power reserved to him by the lease; it was held, that the covenant was sufficiently described in the declaration, by an averment that "the defendant covenanted with the plaintiff, that he should have the peaceable and quiet possession and use of the estate and property so leased to him for and during the term aforesaid;" and that a breach was sufficiently assigned by an allegation that the defendant "has used saws and machinery in the room so reserved to himself in such a manner as to deprive the plaintiff of the use of

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the part of the building and shop so leased to him, and in such a manner that he cannot operate the said machinery and tools, in the manner and for the purpose for which they were designed, to wit, for the manufacture of pails."

The lessor, in a lease for years of a building, water power and machinery, for the manufacture of pails, having reserved to himself one room in the building, together with the privilege of running a turning lathe and saw therein: In an action by the lessee against the lessor, for making use of the room and privilege reserved by him, in such a manner as to obstruct and interrupt the lessee in the use of the demised premises, it was held: (1.) That the reservation must be so construed as to enable the lessee to carry on his factory; (2.) that evidence of the mode, in which the water power reserved had been previously used, was admissible to show a reasonable limitation of the right reserved, and that it was for the jury to determine, whether the saw used by the lessor required more power than was included in the reservation; (3.) that the damages were not to be estimated by the amount of the rent, or of the lessee's profits, but according to the value of the lease; (4.) that on the question of damages, the lessee might prove the condition and capacity of his works for the manufacture of pails, the cost of making them, and their price at the shop and in the market; (5.) and that in reference to this inquiry, the testimony of a manufacturer in another place, whose works and business were similar to those of the lessee, was admissible.

The plaintiff, in an action on a covenant implied in a lease for years, for the quiet enjoyment of the premises, without interruption by the lessor, if he recover a sum in damages not exceeding twenty dollars, is entitled to no more costs than one quarter part of the sum recovered in damages, unless the title to real estate is concerned in such action.

THIS was an action of covenant broken, in which the plaintiff declared, that the defendant, by a certain instrument, made and executed by and between him and the plaintiff, under their hands and seals, dated the 2d of September, 1846, demised and leased to the plaintiff "certain lands and a shop thereon standing, situate in said Greenwich, then and long before used for the purpose of a pail manufactory, with a water privilege belonging thereto, together with the machinery, tools, implements and apparatus, then in said shop and used for the purpose of manufacturing pails, as aforesaid, to have and to hold the same to the said Erick, from the said 2d of September, to the 1st of April then next following; reserving to himself in and by said instrument the middle room in said shop and the privilege of running a turning lathe and saw in said room; and the said William did, then and there, among other things, covenant with the plaintiff, that he should have the peaceable and quiet possession and use of the estate and property so leased to him, for and during the term aforesaid." The

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plaintiff then averred, "that the said William his covenant aforesaid hath not kept but hath broken, in this: That he the said William has used saws and machinery in the room so reserved to himself, in such a manner as to deprive the plaintiff of the use of the part of the building and shop so leased to him, and in such a manner that he cannot operate the said machinery, tools and implements, in the manner and for the purpose for which they were designed, to wit, for the manufacture of pails; and a large amount of timber which the plaintiff had on hand, at the time of the execution of said instrument, of the value of two hundred dollars, remains unwrought; his said business has been for a long time interrupted, to wit, from the said second day of September hitherto; and by means of which, also, the plaintiff has been prevented from performing his contracts for the delivery of pails, which, at the time aforesaid, he had made and entered into with divers persons, and has suffered great loss thereby; also, has been unable to employ laborers in his said business, whom he had then contracted to employ, and has been obliged to pay money for the breach of such contracts; has been deprived of great gains and profits which would have accrued to him by the quiet and peaceable use of the premises, so leased to him as aforesaid; and has been otherwise greatly injured and damaged by the unlawful use by the defendant of the room and machinery so by him reserved as aforesaid." The plaintiff laid his damages at the sum of five hundred dollars. The writ was dated the 27th of December, 1846.

At the trial, which was before *Byington*, J., in the court of common pleas, it appeared, that the plaintiff, on the 2d of September, 1846, being then the owner of certain real estate, comprising an establishment for the manufacture of pails and tubs, by water power, and also, a house and store connected therewith, conveyed the same to the defendant, and, at the same time, made a bill of sale to him of all the tools and machinery contained in the factory, and used in the manufacture of pails; and that, on the same day, and as a part of the same transaction, the defendant made the lease

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declared on of the house, land, factory and tools and machinery.

The following is the material part of the lease: —

"That said Manley, in consideration of the covenants hereinafter contained on behalf of the said Dexter, has demised and leased, and he does hereby demise to the said Dexter, all the real estate I bought of the said Dexter this day, except the middle south room in the shop, reserving to myself the privilege of running a turning lathe and saw in said room. I likewise lease to the said Dexter all the property except the turning lathe, that he gave me a bill of sale of this day. To have and to hold the same to him the said Dexter, until the first day of April next. And the said Dexter agrees, for the use of said property, to paint the window blinds with three coats of paint, and to paint the south end of the house with three coats of paint, and the rest of said house with two coats of paint, the paint being found by said Manley. And the said Dexter agrees, that he will, at his own expense, replace any and all of said goods, which shall be lost or carelessly or accidentally injured during said term. And the said Dexter agrees to warrant and defend all the buildings and tools from fire, that he occupies or uses, and at the end of said term, he shall give to the said Manley peaceable possession of the premises and personal property mentioned in this lease."

In the latter part of November, 1846, the defendant commenced the business of manufacturing laths in the room reserved to him by the lease, and continued engaged therein until the date of the writ. The process of making laths requires three separate operations: first, blocking off, which consists in sawing logs of from six to twelve inches in diameter, and eight feet in length, into blocks four feet long; second, planking up, which is effected by sawing these blocks into plank of two inches in thickness; and, third, splitting, which consists in sawing the plank into laths. The second and third operations occupied about half of the time taken up by the whole.

The defendant, for this business, used circular saws, at-

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tached by gearing or belts to the water wheel, which carried all the machinery in the shop. He had a separate saw for each operation; for the first, a cutting off saw of twenty inches in diameter; for the second, a saw for splitting, a little larger than the first, and about twenty-two inches in diameter; and, for the third, a saw about ten inches in diameter.

There was no evidence, that the plaintiff knew that the defendant contemplated engaging in this business; but there was evidence, that he had been previously engaged therein, at Enfield, and that he took his benches and saws from Enfield to Greenwich.

The plaintiff proved, that at or before the time when the defendant commenced making laths, the plaintiff was using that part of the shop, which was leased to him, for the manufacture of pails, with the knowledge of the defendant; that the process of turning pails requires a steady power, but no more power is required in planking up for pails, than is necessary to saw through a block ten inches in length; that while the defendant was engaged in blocking off, the motion of the wheel was rendered so irregular and unsteady, as somewhat to interrupt the plaintiff's business; and that while the defendant was planking up, the plaintiff could not turn pails at all, and could do nothing with his works.

The reason of the interruption was, that it required a strong power to cut through a log, and a still stronger one to saw it lengthwise. And there was evidence, that the gate was hoisted higher for the latter work; that the moment the wheel was liberated from this labor, its speed was greatly increased, until it entered the log again, to cut a new log or plank; and that sometimes in sawing lengthwise, the plaintiff's works were stopped altogether before getting through the log.

The plaintiff notified the defendant not to use his saw in such a manner; but the defendant insisted that he had a right to do so under the reservation in his lease.

It was in evidence, on the part of the plaintiff, that before the sale of the property by him to the defendant, and the lease from the latter to the former, there was a circular saw

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attached to the blocking off arbor, mentioned in the bill of sale, used for blocking off for pail staves, like the first process before described in making laths. But it appeared, that the saw was taken off in the spring of 1846; that the arbor, pillars, and platform and apparatus, which the defendant used, remained and had been there for two or three years previous; and that no other saw had been used there, in that room, prior to the sale. The saw was set in the arbor at the time of the sale.

It appeared, also, in evidence, that saws of different sizes might be attached to such an arbor, and that arbors were so constructed that the saws used upon them might be changed with facility.

The saw was used by the plaintiff, before it was taken off, for sawing pail staves, and this work did not require so much power, or interrupt the turning of pails so much, as the process of planking up in making laths, though it was done by means of a similar arbor. There was no evidence that the defendant knew how the saw had been used, other than would appear from the facts herein stated.

In order to prove the damages occasioned by this interruption of his business, and the value of his lease, the plaintiff offered evidence to show the condition and capacity of his works, the number of pails that could be made, the cost of making them, and their price at the shop and in the market. He also called a witness, who had been engaged in the manufacturing of pails for ten years in Athol, a distance of about twenty-five miles from the plaintiff's works, and who testified to the particular items of the cost of the manufacture, to the price of pails at the shops and in the market, and to the profits of the business. The process of manufacture, and the kind of pails made at the works of the plaintiff and of the witness, were similar. This evidence was objected to by the defendant, but was admitted by the court for the purposes stated.

The defendant contended, that the lease contained no covenant for quiet enjoyment; that no breach of such covenant was properly alleged in the declaration; that the

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evidence was not sufficient in law to prove a breach, because the defendant had a right by his reservation to use a saw in the manner used by him; that the use of several saws, successively, only one being used at a time, was not a breach; that if the covenant was broken, the plaintiff could not recover more than at the rate of the rent reserved, which was the painting of the house, of the value of which he offered evidence; and inasmuch as the plaintiff continued to have the use of the dwelling-house and land to the end of the term, he insisted that the damages could be no more than a just proportion of the rent.

But the judge instructed the jury, that there were sufficient words in the lease to import a covenant of quiet enjoyment; that a breach of this covenant was sufficiently set forth in the declaration; that the defendant had a right, by his reservation, to use the saw, which had before been used in the room reserved, to carry on any proper business to which the property so reserved was adapted, or to use a saw of like kind, and requiring the same amount of water power, as the one that had been used there, in a manner proper and usual for carrying on such business; that the defendant had no right to draw water for any purposes of waste, but that water power for one saw, such a one as had been used, if wanted, was reserved; and that the defendant might use the arbor that was in the shop, at the time of the sale, or any other similar arbor.

The jury were further instructed, that the defendant had a right to use one saw, and there being no limitation expressed in the lease as to the time he might use it during each day, he had a right to use it, as he had occasion, in his business, during the usual hours of labor through the day; and, as he might use one saw in this manner, he might use different saws successively, at different times of the day, if he did not by so using them draw or use more water power than he did by the use of the saw he reserved the right to use.

The plaintiff contended, that it appeared by the evidence, that more power was required and used for planking up, in the second step of the process of making laths, than was

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required to block off; and that if this were proved, it would be a breach of the covenant. But the court instructed the jury, that if planking up did require more power, at the same moment, than was reserved by the lease for one saw, as explained by the court, and the power was so used at the same moment, then such use would be a breach; but if it did not require more power at the same moment, but only required more power, by means of a longer application of the power, in planking up a log of four feet long, than in cutting off one of from six to twelve inches in diameter, such use would not be a breach of the covenant.

On the question of damages, the plaintiff contended, that the injury sustained by him, being the amount of profits which he might otherwise have made, was the rule of damages. But the jury were instructed, that neither the rent reserved, nor the amount of profits, was the rule of damages; that where a lessee was entirely deprived of the use of the property leased, the rule of damages was the value of the lease, or what the property would fairly rent for; that, on this subject, the rent reserved, the amount of the business, and the profits of it, were proper evidence to be considered in estimating the damages; that there being only a partial disturbance of the plaintiff in the enjoyment of his lease, he was entitled only to a just proportion of the value of the lease, according to the extent of the injury; and that the jury should take into consideration the fact that the property was leased with the restriction expressed.

The jury returned a verdict for the plaintiff in the sum of $16·87; and the defendant thereupon alleged exceptions.

C. P. Huntington, for the plaintiff.

1. The lease contains a covenant for quiet enjoyment: (1.) By force of the words "demise and lease." 3 Com. Dig. 259, Covenant, A. 4; 1 Har. Dig. 708, Covenant, I.; 2 Har. Dig. 1431, Landlord and Tenant, Art. 23. (2.) By force of the words "to hold and occupy." *Ellis* v. *Welch*, 6 Mass. 246, 250. A covenant may be implied in an instrument containing express covenants. *Gates* v. *Caldwell*, 7 Mass. 68 *Pomfret* v. *Ricroft*, 1 Wms. Saund. 322.

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2. The breach of the covenant for quiet enjoyment is sufficiently set forth in the declaration. 2 Greenl. Ev. §§ 236, 242, 243, and notes.

3. And each breach is fully proved by the evidence. The reservation must be construed to be a reservation of such water power, machinery, lathe and saw, as had been usual in the previous occupation. *Pettee* v. *Hawes*, 13 Pick. 323. The reservation in this case is strictly an exception, being part of the thing granted; whereas a reservation proper is something not in being, but newly created and reserved. Co. Lit. 143, a; 47, a; Vin. Ab. Reservation, (A.) (R.) An exception is to be taken most strongly against the grantor. Com. Dig. Fait, E. 5; 4 Com. Dig. 167, Exception, citing 10 Co. 106, b; *Dunham & Sunderland Railway Co.* v. *Foster*, 2 Ad. & El. N. S. 940; *Bowler* v. *Wolley*, 15 East, 443. See also, as to the construction of the reservation, 1 Har. Dig. Covenant, 3; 3 Com. Dig. 269, Covenant, E. 2. By the lease of the water power, rooms, machinery and tools, the use of the water power in its accustomed mode is implied. *Pomfret* v. *Ricroft*, 1 Wms. Saund. 322, n (5); *Prescott* v. *White*, 21 Pick. 341, 342; *Fitchburg Cotton Man. Corp.* v. *Melven*, 15 Mass. 268, 271.

4. The ruling of the court on the subject of damages was correct. It was analogous to the rule in cases of eviction by paramount title, where the grantee has become seized, and the covenant is in the future; the value of the estate at the time of eviction. *White* v. *Whitney*, 3 Met. 81, 89; *Norton* v. *Babcock*, 2 Met. 510.

5. The plaintiff is entitled to full costs if the verdict is sustained. The claim was an interest in real estate. *Plympton* v. *Baker*, 10 Pick. 473, 476; *Padelford* v. *Padelford*, 7 Pick. 152.

R. A. Chapman, for the defendant.

1. The breach of covenant complained of is not sufficiently set forth. It should be set forth specially. *Marston* v. *Hobbs*, 2 Mass. 433; *Wait* v. *Maxwell*, 4 Pick. 87.

2. The case, as stated, shows no wrong done by the defendant. He had a right to use any saw adapted to the

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arbor, and was not limited to the kind of saw previously used, which he knew nothing of. And he had a right to do any work commonly done with a circular saw. The irregular use of the power was necessarily incident to any saw. No saw can use the power continuously.

3. The rule of damages laid down by the court below is not supported by the cases in 2 and 3 Metcalf. And see *Baldwin* v. *Munn*, 2 Wend. 399, 405; *Kinney* v. *Watts*, 14 Wend. 38, 40; *Kelly* v. *Dutch Church of Scotland*, 2 Hill, 105.

4. The evidence admitted to prove damages was incompetent; it was in violation of the rule confining the evidence to the points in issue; 1 Phil. Ev. *c.* 7, § 3; and was much like that admitted in *Robbins* v. *Harvey*, 5 Conn. 335. It did not appear what rent the Athol witness paid, nor how much his profits depended on his own management.

5. As to the question of costs, the action is personal, on a personal covenant, and relating to personal property. The cases cited do not apply. See *Shurtleff* v. *Hutchins*, 10 Met. 248; *Hunt* v. *Hanover*, 8 Met. 343. By the last authority, if the case be of the character supposed by plaintiff, it should be dismissed for want of jurisdiction in the court of common pleas.

And to raise the question of jurisdiction, and to present more properly the question as to the declaration, the defendant filed a motion in arrest of judgment.

Huntington, in reply.

The defendant, by his plea, might have raised a question as to the title to real estate; and the action is founded on an interest in real estate. The defendant in fact denies the plaintiff's right to hold and enjoy real estate in the mode claimed. As to the objection to the want of jurisdiction, the declaration discloses no claim of easement, so that no objection lies on that ground.

Shaw, C. J. This case comes before the court on exceptions taken by the defendant to the rulings and decisions of the judge, on the trial in the court of common pleas. It is in form an action of covenant, on a lease made by the defendant to the plaintiff of premises, including a shop, with a

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water power attached, which had been used and appropriated for the manufacture of pails and tubs by machinery carried by water power. The facts appear to have been, that in September, 1846, Dexter, the plaintiff, was the owner of the manufactory in question, with a house and store; that on that day he conveyed the real estate, and made a bill of sale of all the tools and machinery contained in the factory and used in the manufacture of pails, to Manley, the defendant; that, on the same day and as a part of the same transaction, Manley made the lease in question of the house, land, factory, tools and machinery, to hold to the first day of the ensuing month of April; for which, instead of other rent, the plaintiff was to do on the premises certain painting described in the lease. For the course of the trial, and the instructions excepted to, reference is to be had to the bill of exceptions.

The first question is, whether this lease contains an implied covenant for peaceable and quiet enjoyment, there being none in express terms. It is unnecessary to consider whether a covenant would be implied, amounting to a warranty against incumbrances, or a paramount title, or against any rightful claims of third persons; it is sufficient for the present case, that the lease contains an implied covenant, which is a good warranty by the defendant against his own acts. Every grant of any right, interest, or benefit, carries with it an implied undertaking, on the part of the grantor, that the grant is intended to be beneficial; and that so far as he is concerned, he will do no act to interrupt the free and peaceable enjoyment of the thing granted. And we cannot conceive why this is not sufficiently set forth in the declaration. It is sufficient to declare on an instrument according to its legal effect; and if an instrument has a certain legal effect, upon its true and proper construction, such effect may and often must be expressed in terms in the declaration. It is another question, whether this declaration properly alleges special damages; we are inclined to think it does not.

But the main question is upon the terms and construction of the lease; which not being skilfully drawn, it is difficult to

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derive from it the true intent and meaning of the parties. The rights which the lessor intended to confer upon the lessee by the demise, and those which he intended to retain to himself by the reservation, must be ascertained by the whole instrument taken together, the deed and bill of sale therein referred to, and the subject matter to which the lease applies.

The lease embraces all the real estate conveyed by the lessee to the lessor on the same day (except the middle south room), and also the machinery, tools and apparatus in the shop, conveyed by the bill of sale from the lessee to the lessor, reserving the right of running a turning lathe and a saw in the room excepted out of the demise. The lessee covenanted to return the tools and apparatus in good order; and, at his own expense, to replace those which should be lost or damaged. In fact, these tools and apparatus were adapted to the fixtures and water wheels, and the wh ›le, with the water power, were fitted for the manufacture of pails. In effect, therefore, although the premises leased are not described as a pail factory, yet the lease is of a mill and water power, with tools and machinery, for the manufacture of pails, requiring a certain amount of power, and a mode of using it, understood by the parties. The instrument is to be construed, as far as possible, beneficially for the lessee, so as to enable him to use the premises for the purpose intended. But it must also be construed with a just reference to the exception and reservation, in favor of the lessor, of the use of one turning lathe, and one saw. The latter must necessarily have some limitation, otherwise it might be construed to mean one saw, for the sawing of boards, marble, or granite, absorbing the whole power, and thus be directly repugnant to the grant.

The parties having failed to express themselves more precisely as to this reservation, it must have a reasonable construction, so as to be consistent with the beneficial use of the pail factory by the lessee; and we think the court did not err in directing the jury, that the previous mode of using the power reserved, in the room excepted, was one means of

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ascertaining the reasonable limitation of the right thus reserved.

The most questionable point in this part of the charge is, that, under the right reserved to use one saw, the defendant might use three different saws of different sizes, successively, on the same day, if he used only one at a time. This instruction is open to the consideration, that if the defendant were confined to one saw, though he might keep it running the whole of each day, yet in any business which he would be likely to carry on with one saw, it would probably be at rest a part of the time, from which the plaintiff would have a chance of benefit. But, whether this construction was correct or not, it was one which was favorable to the defendant, which he could not object to, and to which he has not taken any exception.

The question was left to the jury, whether the use of the saw, in the manner it was used by the defendant, required more power than that reserved by the lease, construing and explaining the lease as above stated; with the instruction that, if such was the case, then it was a breach of the defendant's implied covenant; and in this opinion we concur.

Much of the argument of this case turned upon the rule prescribed by the court for the assessment of damages, and the evidence admitted, as offered on the part of the plaintiff. This is not a case, in which the law fixes any precise rule of damages; being a case of partial disturbance and interruption, even if the rent of the premises had been fixed and certain. But in this case, the difficulty is greatly increased. This partial lease of a portion of the premises, for a short period, seems to have been one element in the adjustment of the purchase and sale of the real estate, and of the machinery, tools and personal property; the consideration to be paid for them; the time at which the purchaser should be put in possession; and in what condition the house should be put and left by painting. Suppose, therefore, that this particular demise had been made on the nominal reservation of the rent of one dollar; it would not be reasonable to hold, that the damages for a disturbance must be limited to one dollar.

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This was therefore peculiarly a case, where the question was, what direct damage the plaintiff had sustained by it; and it seems to us that there was no error in the court, in admitting the modes of estimating the damage, and the evidence tending to establish some approximation to it, which were allowed in the present case.

We think therefore that the exceptions must be overruled, and judgment entered on the verdict for the plaintiff.

But, upon the question of costs, the court are of opinion, that the plaintiff can recover no more than one quarter as much costs as damages. This is a special action, brought to recover damages for the breach of a personal contract, in relation to a lease for years, which is a chattel interest. Besides, it nowhere appears by the record that the title to real estate came in question. The question depends on the Rev. Sts. *c.* 85, § 3, and *c.* 121, § 3, and is settled by the recent case of *Shurtleff* v. *Hutchins*, 10 Met. 248.

Exceptions overruled.

SAMUEL D. VOSE *vs.* JEREMY MORTON.

The tenant in a real action, brought to recover land levied on in execution of a judgment of the circuit court of the United States, in favor of the demandant against a third person, to which judgment such tenant is not a party or privy, is not concluded thereby from showing by proof that the judgment is erroneous and void for want of jurisdiction of the parties.

If a suit is commenced in the circuit court of the United States, in the name of a citizen of another state, under a general authority or permission or otherwise, upon a cause of action in which the nominal plaintiff has no interest legal or equitable, the court has no jurisdiction of the parties; and if such suit be brought without the nominal plaintiff's authority or direction, but is afterwards ratified or sanctioned by him; or if after the bringing of the suit, a more formal transfer of the cause of action be made to the plaintiff, and accepted by him; such ratification or transfer will not give the court jurisdiction.

Where an action is brought in the circuit court of the United States, in the name of the indorsee or holder of a promissory note payable to order, or of the bearer of a note transferable by delivery, and judgment is rendered therein by default; it is competent for one, not a party or privy to such judgment, against whom it is sought to be enforced, to impeach the same by showing that the note was not actually negotiated to the nominal plaintiff, before the commencement of the action.

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Vose v. Morton.

THIS was a real action for the recovery of an undivided half of certain land in Hatfield, and was tried before *Metcalf*, J., in this court. The demandant, in support of his title, and as *prima facie* evidence of his case, relied on a copy of the record of a judgment in the circuit court of the United States, for the district of Massachusetts.

From this record, it appeared, that, on the 7th of December, 1846, a writ was sued out in the name of the demandant against one Moses Morton, 2d, returnable at the next term of said court, wherein the plaintiff was alleged to be a citizen of Albany, in the state of New York, and the defendant a citizen of Hatfield, in this state. The cause of action set forth in the declaration was a promissory note, dated at Hatfield, November 16th, 1846, by which the defendant therein, Moses Morton, 2d, promised to pay Whitney and Fenno, or bearer, one thousand and fifty-seven dollars and sixteen cents, on demand, with interest. Judgment was recovered in this action on the said note, on the 30th of June, 1847, on the default of the defendant. Execution was issued on the judgment, on the 26th of July, and on the 28th was levied on the interest of the judgment debtor in the premises demanded in this action. The demandant contended, that by the return, the real estate levied upon was attached on the 7th of December, 1846.

The tenant claimed the premises under a deed of quitclaim and partition from Moses Morton, 2d, and other heirs, executed prior to the alleged attachment, namely, on the 21st of October, 1839, and recorded on the 9th of December, 1846, two years after the attachment; and contended that as he was a stranger to the judgment and record, the production of a copy thereof was not sufficient proof of the facts relied on to establish a *prima facie* case against him; but the court overruled the objection.

The tenant contended, further, that the demandant was not a *bona fide* creditor of Moses Morton, 2d, and, therefore, was not entitled to maintain this action; that Whitney and Fenno were the real plaintiffs in interest in the suit in the

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circuit court; and that in defence he could impeach the judgment, by proving a want of jurisdiction in that court.

To establish this defence, the tenant called Moses Morton, 2d, as a witness, who testified, that he was formerly a trader in Hatfield; that Whitney and Fenno, the payees of the note on which the judgment of the circuit court was rendered, were merchants in Boston; that having become embarrassed in his affairs, he wrote to Whitney and Fenno, in consequence of which Fenno came to his house on the evening of Friday, the 4th of December, 1846, and remained there during the night; that the witness then made a statement of his circumstances to Fenno, and told him that it was his design to go into insolvency for the benefit of his creditors; that he exhibited to Fenno an inventory of his assets embracing the homestead then occupied by him (not being the demanded premises), which he told Fenno was all the real estate he owned; that there was a mortgage thereon of $2000, and he called it worth in all $3500; that the witness told Fenno that if there could be an arrangement made for the benefit of his creditors, he was willing to make it and save the expense of an assignment, that Whitney and Fenno were his principal creditors, but he had three others in Boston, one in Hartford, and two in Hatfield (the witness did not state the amount); that, in reply to this proposition, Fenno seemed to think there was no necessity for the witness's making an assignment, but told him to hold on, and he (Fenno) would see the other creditors, and ascertain whether they would come into an arrangement, and if they could thus save expense, it would be best; that the note above mentioned was given at the suggestion of Fenno, who wrote it accordingly, for the amount due from the witness to Whitney and Fenno, while he was at the witness's house, and, as the witness thought, on the morning of the 5th of December, 1846; that the note was dated on the 16th of November preceding, for what reason the witness did not know; that some part of the account of Whitney and Fenno against him, the witness thought, was not due when he gave the note; that on the morning when the note was given,

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Fenno left the witness's house for Springfield, and the witness heard no more of the matter, until the attachment was made, two days afterwards, on the 7th of December, in the afternoon.

The tenant rested his case upon this evidence and contended, that it was sufficient to put the demandant upon the proof of something more than he had as yet offered, and would otherwise authorize a finding by the jury in his favor.

The demandant contended that the evidence was inadmissible; but that if admissible, it would not justify a verdict for the tenant.

The judge ruled, that the evidence was admissible and proper for the consideration of the jury, and that if they believed there was not a *bona fide* sale and transfer of the note to the demandant, but that he was merely a nominal party to the suit in the circuit court, and that the same was brought wholly for the benefit of Whitney and Fenno, the jury would be authorized in finding a verdict for the tenant.

The jury thereupon returned a verdict for the tenant. If the rulings of the judge were wrong, a new trial is to be granted; otherwise, judgment is to be rendered on the verdict.

R. A. Chapman, for the demandant.

C. P. Huntington, for the tenant.

Shaw, C. J. This is a real action to recover an undivided moiety of an estate in Hatfield. The tenant claims title to the premises under a deed of quitclaim and partition executed by Moses Morton, 2d, several years prior to the attachment hereafter mentioned, to wit, in October, 1839, but not recorded until two days after the attachment made, namely, on the 9th of December, 1846.

The demandant claims title under an attachment followed by a valid judgment in the circuit court of the United States, an execution on that judgment, and a levy of the execution on the premises, as the property of Moses Morton, 2d, the judgment debtor. If this title is well established, it must prevail, although the tenant had a valid deed of prior date which was good against every body but creditors, and pur-

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chasers without notice. But the demandant must make out his case strictly; he must prove that he was a creditor of Moses Morton, 2d; that he attached the premises prior to the registration of the tenant's deed; and that such attachment was followed by a good judgment, execution and levy.

The first point relied upon by the demandant is, that the judgment of the circuit court is conclusive, and that the tenant cannot aver against it. But we are of opinion, that this position cannot be maintained. A judgment is conclusive only against parties and privies. The tenant is in no sense a party or privy to that judgment. He is, indeed, privy in estate with Moses Morton, 2d, under whom he claims the demanded premises; but no question respecting the title to such estate was embraced or determined in that suit. It was only after that judgment was rendered, that by a distinct and collateral act, the judgment creditor attempted to satisfy his execution upon it, by a levy on the premises claimed by the tenant. At the time the judgment was rendered, the tenant had no reason, no occasion and no right, to question its validity. Being neither a party nor privy to the judgment, he cannot have a writ of error to reverse it, although it may be erroneous and void; but, when such judgment is set up collaterally to defeat the tenant's title, which is otherwise good, and the tenant can show that the judgment is erroneous, either in matter of law or fact, he may do so by proof. It is a general and established rule of law, that when a party's right may be collaterally affected by a judgment, which for any cause is erroneous and void, but which he cannot bring a writ of error to reverse, he may, without reversing, prove it so erroneous and void, in any suit, in which its validity is drawn in question. The cases are numerous; and a few only will be cited, including the first and the last, which have been decided in Massachusetts. *Alexander* v. *Gould*, 1 Mass. 165; *Smith* v. *Saxton*, 6 Pick. 483; *Pond* v. *Makepeace*, 2 Met. 114; *Leonard* v. *Bryant*, 11 Met. 370.

The tenant then contends, that this judgment cannot be set up to defeat his title, because the circuit court of the United States had no jurisdiction. Admitting that the

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judgment, in the absence of all proof, might be taken to be *prima facie* evidence of the jurisdiction of the court, the tenant undertakes to prove, that the circuit court had no jurisdiction of the parties or of the subject matter. When a court has general jurisdiction of all matters of contract and debt between any and all parties, without regard to their domicil, it may be well held, that the production of a note payable to order, and indorsed by the payee, in blank, or the production of a note payable to bearer, and transferable by delivery only, is sufficient to show that the court *prima facie* has jurisdiction of the parties and of the subject matter; and then if the defendant has any special exception to the jurisdiction, as the pendency of another action or the like, he must plead it in abatement. But the circuit court of the United States is a court of limited jurisdiction; and, by the constitution and laws of the United States, has no jurisdiction of the parties, unless one of them is the subject of some foreign state or country, or of some one of the other states of this union. If, therefore, a suit is commenced in that court, in the name of a citizen of another state, under a general or assumed authority and permission, or otherwise, upon a cause of action in which such party has no interest, legal or equitable, the court has no jurisdiction of the parties; and if brought without the plaintiff's authority or direction, but ratified or sanctioned afterwards, it would not aid it; and so if after suit brought, a more formal transfer of the negotiable note and cause of action were made to him and accepted by him, it would not show that he had any such cause of action when the suit was commenced, and so it would not show that the court had jurisdiction.

If, therefore, the alleged cause of action be, that the plaintiff is the indorsee or holder of a promissory note payable to order, or the bearer of a note transferable by delivery, if it appear, that such note was not actually negotiated to him, before the commencement of the action, the circuit court of the United States has no jurisdiction.

In the present case, we are of opinion, that the evidence was rightly admitted, and had a strong tendency to prove,

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especially in the absence of all proof to the contrary, that the nominal plaintiff had no interest in the note, even if the suit was brought with his knowledge and assent; but, on the contrary, that the entire interest was in the payees named in the note; that the suit was commenced at their instance and expense, and for their benefit; and they being citizens of this commonwealth, that the circuit court of the United States had no jurisdiction. We think, therefore, that the court were right in directing the jury, that the evidence was admissible and proper for their consideration, and that if they believed there was not a *bona fide* sale and transfer of the note to the demandant, but that he was merely a nominal party to the suit in the circuit court, and that the same was brought wholly for the benefit of Whitney and Fenno, the jury would be warranted in finding a verdict for the tenant.

Motion for a new trial overruled, and judgment on the verdict for the tenant.

WILLIAM F. ARNOLD, Assignee, *vs.* CORNELIUS DELANO.

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165 310
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The owner of a large quantity of wood, which was lying in a pile on his own land, having sold a portion of the same, and measured off and marked the part sold, with an agreement that the purchaser might remove it within a year, gave the purchaser a bill of sale of the wood, and received from him his promissory note for the price payable in six months, before the expiration of which time the purchaser became insolvent: It was held, that the vendor might retain the wood so sold against the assignee in insolvency of the purchaser, until the price thereof was paid or tendered to him; and that the right of the vendor in this respect was not varied by the giving of the note for the purchase money, so long as the note remained in the hands of the vendor not negotiated, but ready to be delivered to the promisor or his assignee, on the discharge of the lien; or by the giving up of the bill of sale by the purchaser to the vendor, at his request, after the insolvency of the former; or by a sale of a portion of the wood by the vendor, after the expiration of the year within which it was to be removed by the purchaser.

THIS was an action of trover, brought by the plaintiff as the assignee of Arthur Sowerby, an insolvent debtor. and was submitted to the court of common pleas upon the following agreed statement of facts:

On the 30th of March, 1848, Sowerby and one Grant,

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who were partners as silk manufacturers, in Northampton purchased of Delano, the defendant, sixty-five cords of wood, then piled with a much larger quantity on Delano's land. The wood sold was measured off at the time of the sale, but no otherwise separated from the residue, than by means of a stake put down to designate the extent of sixty-five cords. The contract was made with Sowerby, and a bill of the wood was given him by Delano, as follows:

"Messrs. Sowerby & Grant. Bo't of C. Delano.
"1848, March 30th. 65 cords wood, ... $97·00
"Received payment by note at 6 mos. at
"Northampton Bank. C. DELANO."

At the time of making the contract, there was no formal taking possession or delivery of the wood, except as above stated, but the purchasers were to remove the same before the 1st of April, 1849.

On the 29th of June, 1848, Sowerby applied personally for the benefit of the insolvent law, and a warrant was accordingly issued to Ansel Wright, as messenger, on the same day. Possession was taken of the property at the silk works, by the messenger, on the 30th of June, and a schedule of assets was furnished him by Sowerby on the same day. On the schedule was the following entry, in the handwriting of the messenger: "65 cords of wood on C. Delano's land." No formal possession was taken of the wood by the messenger; nor was any entry made by him on the land where it was piled, which was distant, in fact, two miles or more from the silk works. On the 15th of July, Sowerby furnished a schedule of creditors, on which was this entry: "Cornelius Delano, Northampton. Note. Wood. No security. $97."

On the evening of Saturday the 1st of July, Delano, having heard of the insolvent proceedings, gave the messenger notice that the wood had not been paid for, and that he claimed to hold it, until the price should be paid. Delano also saw Sowerby the same evening, and requested him to give up the bill and take the note. Sowerby took until the next Monday morning for consideration, and being then

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applied to, gave up the bill to Delano, who thereupon cancelled the note. The first publication of notice of the insolvency did not take place until Monday afternoon.

On the 17th of June, 1848, Sowerby and Grant advertised a dissolution of partnership, and gave public notice that Sowerby was duly authorized to settle all accounts of the late firm. As a part of the terms of dissolution, Sowerby undertook to pay all the partnership debts, and Grant conveyed to him all his right and title in and to the partnership property; but this conveyance was not known to Delano. At the time of the dissolution, the partners, severally, as well as the partnership, were, in fact, deeply insolvent.

The plaintiff was appointed assignee of Sowerby in October, 1848; the first meeting of creditors having been continued on account of certain legal objections; and the assignment was then first made by the commissioner.

To the demand made by the assignee on Delano for the wood, Delano answered that he could have it whenever he paid for it; and Delano has always been willing to give up the wood upon payment of the price. Subsequent to the 1st of April, 1849, Delano sold a portion of the wood measured off; but there has always remained in the same lot more than sixty-five cords of similar quality, of which he has offered to give up that amount, upon payment of the price agreed upon.

Upon the foregoing statement of facts, the court of common pleas gave judgment for the plaintiff, whereupon the defendant appealed to this court.

The case was argued in writing, as follows, on the points considered by the court.

C. Delano, for the defendant.

1. The insolvency taking place before the vendee had removed the wood, the vendor could exercise the "right of retention" for the price. Blackb. on Sales, (Law Lib. ed.) 224, 225, 226, and cases there cited. The defendant has the superior equity, 2 Kent, (5th ed.) 542. The burden of proof is on the plaintiff to show an abandonment of the right. Blackb. *ubi sup.* In order to extinguish the vendor's right of

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retention, as between vendor and vendee, or his assignee in insolvency, the actual possession must have been parted with by the vendor, and acquired by the vendee, or by some person especially authorized thereto. Blackb. 200. Neither the giving of a credit, nor the fact that the wood was measured off, affords any decisive evidence of that kind of delivery, which displaces the vendor's lien. The cases of stoppage *in transitu* are analogous. See *Ilsley* v. *Stubbs*, 9 Mass. 65; *Stubbs* v. *Lund*, 7 Mass. 453; *Coates* v. *Railton*, 6 B. & C. 422; *Jackson* v. *Nichol*, 5 Bing. N. C. 508; *Whitehead* v. *Anderson*, 9 M. & W. 518; Blackb. 216, 241. *A fortiori* in a case of retention. Blackb. 201, 324; *New* v. *Swain*, 1 Dans. & Ll. 193; *Dixon* v. *Yates*, 5 B. & Ad. 313; *Miles* v. *Gorton*, 2 Cr. & M. 504; *Townley* v. *Crump*, 4 Ad. & El. 58. In the last three cases, as here, there was no place of ultimate destination specified.

The giving up of the bill of sale by Sowerby, at the defendant's request, was merely to facilitate the exercise of the right set up, and was fully justified. And whether defendant called it rescinding the contract or not, cannot affect his rights. See *Naylor* v. *Dennie*, 8 Pick. 198; *Wentworth* v. *Outhwaite*, 10 M. & W. 436.

2. Sowerby's agreement to give up the contract, made before the first publication of notice, was good against his assignee. *Clarke* v. *Minot*, 4 Met. 346. He might renounce his right to property not yet come to his hands. *Atkin* v. *Barwick*, Stra. 165; *Salte* v. *Field*, 5 T. R. 211; *Richardson* v. *Goss*, 3 B. & P. 119.

C. P. Huntington, for the plaintiff.

1. The defendant could not exercise the right of stoppage. For in order to entitle him to that right, he must show the property to be either in the hands of some middle-man, as a carrier, or the like; or in some intervening place for storage; he must also show some intervening time, and some specific ulterior destination of the property; neither of which appears in this case. The vendee had the immediate right of possession. The agreement to let the wood remain on the land for a year, must be taken to have been a part of the

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consideration of the sale, and is equivalent to the vendor's receiving rent for the storage, which defeats the right of stoppage. *Hurry* v. *Mangles*, 1 Camp. 452. There was here a complete delivery in law and in fact, sufficient to defeat any lien even in case of the vendee's insolvency before actual delivery. *Snee* v. *Prescott*, 1 Atk. 245; *Chapman* v. *Searle*, 3 Pick. 38, 42, 43, 44, 45; *Parks* v. *Hall*, 2 Pick. 206, 212, and cases cited; *Riddle* v. *Varnum*, 20 Pick. 280, 284, 285; *Ilsley* v. *Stubbs*, 9 Mass. 65, 71; *Stubbs* v. *Lund*, 7 Mass. 453, 457; 2 Kent, 545, 546; *Stoveld* v. *Hughes*, 14 East, 308, 315; *Lackington* v. *Atherton*, 7 Man. & G. 360; *Gardner* v. *Howland*, 2 Pick. 599, 602, 603; *Leeds* v. *Wright*, 3 B. & P. 320; *Scott* v. *Petit*, 3 B. & P. 469; *Harman* v. *Anderson*, 2 Camp. 243; Long on Sales, 331; *Lickbarrow* v. *Mason*, 1 Smith's L. C. (540) (551) note; 3 Steph. N. P. 2593, 2598, and cases; Chit. Con. (ed. 1839), 343; *Coates* v. *Railton*, 6 B. & C. 422; *S. C.* 9 D. & R. 593; *Valpy* v. *Gibson*, 4 M. G. & S. 837.

2. If the defendant had the right of stoppage, he did not exercise it, but attempted to effect a resale to himself. *Rowley* v. *Bigelow*, 12 Pick. 307; 1 Smith's L. C. 540, note. But Sowerby had not the power to resell; a warrant in insolvency had issued, and the defendant knew it. The defendant having attempted a resale and a preference, and having removed part of the wood and sold it, how could he convert those illegal acts into the enforcement of a different right, — that of mere detention?

Shaw, C. J. This is an action of trover, to recover the value of sixty-five cords of wood, brought by the plaintiff, as the assignee of Arthur Sowerby, an insolvent debtor. It is submitted to the court upon an agreed statement of facts, which being clearly stated, it is not necessary to recapitulate.

On these facts, the plaintiff contends, that there was a complete sale and purchase of the wood, by which the property became vested in Sowerby and Grant; that by the dissolution of partnership between them in June, 1848, and the transfer by Grant to Sowerby of all his right, title and interest in the partnership property, Sowerby stipulating to pay all the partnership debts, this property became vested in

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Sowerby; and that by his subsequent insolvency, the proceedings under it, and the assignment to the plaintiff, the same title to the property became vested in him.

On the other hand, the defendant insists, that though the wood was sold and measured off, with a license to the purchasers to come on to his land, and take it away as they wanted it, at any time within one year; and though a credit of six months was given for the purchase money, and a note was given to the plaintiff payable at the Northampton Bank in six months; yet as the wood remained as it originally lay on his premises, it was in his actual possession; and, as the purchasers became insolvent, and legal proceedings in insolvency were instituted against them, before the price of the wood had been paid, he had a right to detain the wood until payment or its equivalent.

The cause has been extremely well argued on both sides, and many authorities have been cited. But without going over the whole ground, it is proposed to state only what we understand to be the rules of law bearing upon the subject, and to apply them to the facts of the case as they appear in the agreed statement.

There is manifestly a marked distinction between those acts, which, as between the vendor and vendee upon a contract of sale, go to make a constructive delivery and to vest the property in the vendee, and that actual delivery by the vendor to the vendee, which puts an end to the right of the vendor to hold the goods as security for the price.

When goods are sold, and there is no stipulation for credit or time allowed for payment, the vendor has by the common law a lien for the price; in other words, he is not bound actually to part with the possession of the goods, without being paid for them. The term *lien* imports, that by the contract of sale, and a formal, symbolical or constructive delivery, the property has vested in the vendee; because no man can have a lien on his own goods. The very definition of a lien is, a right to hold goods, the property of another, in security for some debt, duty or other obligation. If the holder is the owner, the right to retain is

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a right incident to the right of property; if he have had a lien, it is merged in the general property.

A lien for the price is incident to the contract of sale, when there is no stipulation therein to the contrary; because a man is not required to part with his goods, until he is paid for them. But *conventio legem vincit;* and when a credit is given by agreement, the vendee has a right to the custody and actual possession, on a promise to pay at a future time. He may then take the goods away, and into his own actual possession; and if he does so, the lien of the vendor is gone, it being a right incident to the possession.

But the law, in holding that a vendor, who has thus given credit for goods, waives his lien for the price, does so on one implied condition, which is, that the vendee shall keep his credit good. If, therefore, before payment, the vendee become bankrupt or insolvent, and the vendor still retains the custody of the goods, or any part of them; or if the goods are in the hands of a carrier, or middle-man, on their way to the vendee, and have not yet got into his actual possession, and the vendor, before they do so, can regain his actual possession, by a stoppage *in transitu;* then his lien is restored, and he may hold the goods as security for the price.

The principle we take to be well settled, but the difficulty which arises in practice, — one which has given rise to so many cases, — lies in determining what is such an actual change of possession from the vendor to the vendee, as shall be deemed to put an end to the vendor's lien. Some cases seem to be clear, and to illustrate the rule. If the goods are delivered to the vendee's own servant, agent, wagoner, or ship master, that is in law a delivery to the vendee himself. So if goods are stored in a common warehouse, as the dock warehouses at the London docks, and entered in the books as the property of A. B., and deliverable to him, and a dock warrant issued, and afterwards, upon the proper order of A. B. on the warrant, the whole or a part are transferred to C. D., and entered in like manner in his name, this is an actual change of custody, control and possession, though the goods are not moved from their position. So, if the seller

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sustain different characters, as if a person, who is a livery stable keeper, having a horse to sell, makes a sale to C. D., and then transfers the horse to his livery stable, to be kept for C. D. at a stipulated weekly hire, this may be regarded as an actual change of custody and possession.

But by far the most common case which occurs, is where goods are ordered by letter, on credit, to be sent from one country to another, or from one part of the same country to another, and are accordingly forwarded by a common carrier. There, as the carrier is not the servant of the vendee, the goods, though they have left the actual possession of the vendor, if they have not reached the actual custody of the vendee, or the ultimate place of destination ordered by him, may be stopped *in transitu* by the vendor; and if he can thus stop them, he regains his lien.

Now to apply these rules to the present case: it appears to us very clear, that there was a good sale and delivery of the wood to Grant and Sowerby. The wood was measured and marked off, so that the very sticks composing the sixty-five cords could be identified. And the reason, why marking, measuring, weighing, &c., is necessary, is, that the particular goods may be identified. If ten barrels of oil are sold, lying in a tank of thirty barrels, the buyer can identify no part of it as his, until it is measured. So, if fifty bales of cotton are sold out of one hundred, no particular bales are identified until separation. But, if they are capable of being identified, and by the contract of sale are identified, that is sufficient, and the property passes; as, if in the last case, there are one hundred bales of cotton, numbered from one to one hundred, and the contract is for the fifty odd numbers, or the fifty even numbers, or any other specified fifty numbers, the bales sold are identified though not separated. In the present case, the wood was marked off and identified, and the vendees had a license for one year to come on to the vendor's land and to take it away. This was a complete sale and a constructive delivery, so as to vest the property in Grant and Sowerby; and, on their dissolution and transfer, it vested in Sowerby, and by the assignment in his assignee. Then, the

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question is, whether the defendant had, under the circumstances, a lien for the price, and we think he had.

The purchasers had a license to go on to the defendant's land, and take the wood; whether this license was revocable or not, it is not necessary to consider, as it was not in fact revoked. But the vendees did not enter and take the wood; it remained on the vendor's land, and in his possession, in the same manner as before and at the time of the sale. The vendor acted in no new capacity; he was to receive nothing for keeping; he was precisely in the condition of a vendor, who had not parted with the possession and custody of the goods sold. And this was the state of things, when Sowerby went into insolvency; upon which event, we think, the vendor was remitted to his right to keep possession of the wood as security for the price. Such a vendor in possession is regarded as having a higher equity to retain for the price, than the assignee of a debtor, who has not paid for the property, has to claim it for the general creditors.

Sometimes a question may arise as to what constitutes an insolvency, and whether a mere stoppage of payment, and failure, in the popular sense, is sufficient. In this case, there is no doubt, because there was an insolvency declared by law, and a sequestration of all the vendee's property, under which this wood is claimed by the plaintiff.

If it might be supposed, that the giving of a note in this case was a payment, which would vary the case from that of a simple promise to pay for the wood, we think the answer is, that a promissory note, even if in form negotiable, whilst it remains in the hands of the vendor and not negotiated, but ready to be delivered up on the discharge of the lien, is regarded as the evidence in writing of a promise to pay for the goods purchased, and does not vary the rights of the parties. *Thurston* v. *Blanchard*, 22 Pick. 18.

The fact, that after the proceedings in insolvency commenced, and became known to the defendant, he applied to Sowerby and got up the bill of sale, cannot of itself, we think, avail the defendant. The insolvent could not, in that

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state, vacate the sale, or reconvey the property; and if the wood was worth more than the lien of the defendant upon it, we think that the assignee, on paying the defendant the price, was entitled to the wood for the benefit of the general creditors; and this was a right which the insolvent could not defeat.

A fact was stated, on the part of the plaintiff, as of some weight, namely, that after the expiration of one year from the sale, the defendant sold a part of the wood. Whether, at that time, he had an absolute right to sell the wood or not, it seems to us, that such sale can have no effect on this claim. The plaintiff, if he can recover at all, must recover on the strength of his own title. He must prove a conversion. The action of trover admits that the defendant obtained the possession rightfully; then, if he had a lien and a right to hold until the price was paid, his refusal to deliver the wood on demand to the plaintiff, (such demand not being accompanied with a tender of the price,) was no evidence of conversion; and, until such tender made, the plaintiff has no ground of complaint.

Judgment for the defendant.

LEWIS H. DELANO *vs.* ISAAC W. MONTAGUE.

A parol agreement, between the parties to a lease for years in writing, entered into before the expiration of the lease, that the lessee would take the premises for another year, on the same terms, is within the statute of frauds (Rev. Sts. *c.* 74, § 1), as an agreement not to be performed within a year, and no action can be maintained thereon.

Where the parties to a written lease for years, before the expiration thereof, entered into an agreement, the one to let the estate, and the other to hire it, for another year, on the same terms; and, before the expiration of the lease, the lessee verbally notified the lessor, that he would not carry the agreement into effect; but the lessee, nevertheless, held over after the termination of the lease, although without intending to occupy under the agreement, or under any other agreement, and left within the year; it was held, that the lessee was not liable for the use and occupation of the premises beyond the time of his actual occupation.

THIS was an action of assumpsit, in which the plaintiff declared, first, on a hiring by the defendant of one half of a

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dwelling-house belonging to the plaintiff, and an agreement by the defendant to pay rent therefor; and, second, for the use and occupation of the same premises for ten months from the 1st of April, 1847.

At the trial, which was before *Wells*, C. J., in the court of common pleas, it was in evidence, on the part of the plaintiff, that the defendant had occupied the premises for the year previous to the said 1st of April, under a written lease, at a rent of $75 a year; that on the 3d of March, 1847, the plaintiff and the defendant agreed, but not in writing, the one to let, the other to take, the premises for another year at the same rent; that the defendant remained in the actual occupation of the premises until the 7th of April, 1847, and did not remove all his furniture until the 19th of May, 1847; and it was not denied, that the defendant's occupancy was lawfully determined on the 1st of February, 1848.

On the part of the defendant, it was in evidence, that some time between the 15th and 23d of March, 1847, he verbally refused to take a lease of the premises, according to the parol agreement, and, at the same time, notified the plaintiff, that he should not occupy the premises under the agreement, on the ground that there was a misunderstanding as to its terms.

It was in evidence, also, that the plaintiff, at all times after the 3d of March, 1847, refused to relinquish his claim for rent on the defendant, or to accept from him any surrender of the premises until the 1st of February, 1848.

The jury were instructed that if, before the expiration of the written lease, the parties agreed by parol for a lease of the premises for another year, and before the expiration of the written lease, the defendant notified the plaintiff, that he would not carry the agreement into effect, and, after the expiration of the written lease, did not occupy the premises, intending to occupy the same under that agreement, or any other agreement with the plaintiff, the defendant would not be liable for rent, for any longer period than whilst he occupied the premises, either by living on the same, or by having some of his furniture remaining there; although the jury

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should be satisfied, that the agreement of the 3d of March was as alleged by the plaintiff, and the plaintiff had always insisted that the defendant was bound by the same, and had so notified the defendant whenever the latter refused to carry the agreement into effect.

The jury, under these instructions, returned a verdict for the plaintiff, with damages for the amount due for use and occupation to May 19th, 1847; and the plaintiff thereupon alleged exceptions.

C. Delano, for the plaintiff.

J. W. Boyden, for the defendant.

WILDE, J. This is an action of assumpsit for the recovery of rent on a parol lease, and for use and occupation of the premises described in the declaration.

In the first count, the plaintiff declares on the parol contract, which was proved to have been made on the 3d of March, 1847. The defendant was then in possession of the premises, under a written lease from the plaintiff, at a rent of $75 a year, which was to terminate on the 1st day of April then next following. And it was proved that, on the said 3d of March, the defendant agreed with the plaintiff, but not in writing, that he would take the premises for another year, at the same rent. Upon these facts, it is very clear, that the action cannot be maintained on the first count on the parol contract.

This was an agreement, that was not to be performed within one year from the time it was made; and by the Rev. Sts. *c.* 74, § 1, no action can be maintained on any such agreement, unless the same, or some memorandum or note thereof, shall be in writing. But it is argued for the plaintiff, in support of his exceptions, that the parol agreement was voidable only, and not merely void; and that as the plaintiff continued in possession after the termination of the written lease, he thereby became bound by the parol agreement, as he did nothing afterwards to avoid it. But whether this parol agreement was void or voidable only, and whether the defendant did any thing to avoid it or not, no action can be maintained on the contract; the plaintiff can only recover

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for the use and occupation for the time during which the defendant continued in the possession after the termination of the written lease; and for the rent during this time, the jury, in pursuance of the instructions of the court, found a verdict for the plaintiff. There was evidence tending to prove, that between the 15th and 23d of March, 1847, the defendant refused to take a lease of the premises, according to the parol agreement, on the ground that there was a misunderstanding as to its terms. And, upon this evidence, the jury were instructed, "That if before the expiration of the written lease, the defendant notified the plaintiff, that he would not carry the agreement into effect, and did not after the expiration of the written lease occupy the premises, intending to occupy the same under the agreement, or any other agreement with the plaintiff, he would not be liable for rent, for any longer term than he occupied the premises." That these instructions were sufficiently favorable for the plaintiff cannot, we think, be doubted; for if the parol agreement was only voidable, it was avoided while the defendant was in possession under the written lease; and if he never held possession under the parol lease, it is clear, that, after the determination of the written lease, the defendant was tenant at sufferance, and not tenant at will, as the plaintiff contends. The defendant held over without right, for he had disclaimed all right under the parol agreement; and there was no longer any privity of estate between the parties. This case, therefore, is materially distinguishable from the case of *Little* v. *Martin*, 3 Wend. 219, cited by the plaintiff's counsel. In that case, the tenant entered under a parol agreement for a lease for years of a certain house, and was therefore a tenant at will. But in that case, the defendant was only held liable for use and occupation during the time he had possession by retaining the key of the house; and it was decided, that no action could be maintained on the contract. In the present case, the parol agreement is of no importance, and the case is to be decided in the same manner, and upon the same principles, as it would be, if no such agreement had been made; and if so, unquestionably, the

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defendant was never, according to the evidence, and the finding of the jury, a tenant at will. If he had not given notice to the plaintiff, that he should not hold under the parol agreement, until after the determination of the written lease, he might perhaps be considered as a tenant at will, but as to this question we give no opinion, it not being raised by the exceptions; for the jury have found, under the instructions of the court, that notice was given before the determination of the written lease, and that the defendant never held under the parol agreement.

Another question was suggested by the defendant's counsel, upon which we give no opinion, namely: whether upon the facts found the defendant was liable on the count for use and occupation for any rent.

By the common law of England, a tenant at sufferance is not liable to pay rent. Cruise's Dig. tit. 9, *c.* 2, § 6 (Greenl. ed.); 4 Kent, 116.

But as the defendant did not except to the instructions of the court on this point, the question is not raised, and has not been considered. *Exceptions overruled.*

EPHRAIM ARNOLD *vs.* CHANDLER SABIN.

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When the decree of a judge of probate, appointing an administrator, is appealed from, the authority of such administrator is thereby suspended, and any further proceedings by him in that capacity are irregular.

In a complaint to the judge of probate, for embezzlement of the estate of a person deceased, the complainant having described himself as "administrator and creditor," and it appearing that he was not entitled to act as administrator, it was held, that the words "administrator and" were material and could not be rejected as surplusage.

THIS was an appeal from a decree of the judge of probate for the county of Hampshire.

Chandler Sabin having been appointed administrator of the estate of Arba Arnold, son of the appellant, who died leaving no wife or child, an appeal was seasonably taken

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from the decree making this appointment, and the necessary steps pursued to promote the same by the appellant.

Notwithstanding this appeal, Sabin, alleging himself to be interested in the estate of the said Arba, as administrator and creditor, filed a petition to the judge of probate, averring the concealment and embezzlement of the property of the deceased by the appellant, and praying a citation to him to answer interrogatories, pursuant to the statute. The citation was issued accordingly, and the court ordered the appellant to answer the interrogatories. From the last decree, this appeal was taken.

E. G. Bowdoin, for the appellant.

I. H. Conkey, for the appellee.

Shaw, C. J. By the appeal from the decree of the judge of probate appointing Sabin administrator, his authority as such administrator was suspended, and his proceeding afterwards to take out a citation against the appellant, for embezzlement, and to promote the same, was irregular, under the Rev. Sts. *c.* 83, § 43.

It is argued, that this petition may be sustained, on the ground, that the petitioner describes himself as administrator and creditor, and it is sufficient if he is a creditor, within the seventh section of the Rev. Sts. *c.* 65, which provides for complaint made by any executor, administrator, heir, legatee, creditor or other person interested in the estate of any person deceased, &c.

It is very questionable, whether this is not limited, by necessary implication, to the case of a deceased person, whose estate is under administration, that is, one on which letters testamentary, or letters of administration, have been granted. How else is the jurisdiction of this process, which is in its nature subsidiary and interlocutory, to be determined by the judge of probate, if it is not by the fact, that the estate is in the process of settlement before him?

Further, to what useful end would it conduce to inquire and ascertain, if any person has property concealed, or withheld, if there be no person qualified and authorized to demand it, or even take it into custody and give a legal acquit-

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tance for it, if voluntarily surrendered? From whom can it be said to be concealed, embezzled or withheld?

But we do not consider that an answer to these questions is necessary in this case. The respondent alleges, in his petition, that he is "administrator and" creditor; but the words "administrator and" are material, and cannot be treated as surplusage. It may have been upon this ground alone, that the judge took jurisdiction.

Decree ordering the appellant to answer interrogatories reversed and annulled, and proceedings under it vacated.

Charles Gates *vs.* David Mack & others.

If a claim against the estate of an insolvent debtor be contested by the assignee, on the ground of a discharge therefrom by previous proceedings in insolvency against such debtor, the validity of the certificate may be impeached by the creditor, and tried and decided by the commissioner.

This was an appeal from a decree of the commissioner of insolvency for the county of Hampshire, refusing to allow a claim presented against the estate of Leonard Campbell, an insolvent debtor, of whom the appellees were the assignees.

The appellant having duly presented his claim, at the third meeting of the creditors, the assignees objected thereto, that Campbell had been discharged from the same, by former proceedings in insolvency, and produced his certificate of discharge in due form. The appellant denied the validity of the certificate, and offered to introduce evidence to impeach it, by showing that it had been fraudulently obtained. But the commissioner, being of opinion, that he had no right to enter upon such a hearing, refused to receive the evidence, and rejected the claim.

The case was submitted, without argument, and with the agreement, that if the court should be of opinion, that the appellant might contest the validity of the discharge, on the ground of fraud, the case should be sent to a jury for trial; otherwise the appeal should be dismissed.

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By the court. The court have no doubt, that Gates, the appellant, had a good right to contest the validity of the insolvent's former discharge. If it was obtained by fraud, it was no bar to the appellant's claim and proof of debt. On that claim, therefore, the validity of the certificate of discharge was directly in issue.

Where a question of fact is in controversy before a tribunal not so constituted as to allow of a trial by jury, as a judge of probate, justice of the peace, commissioner in insolvency, or the like, the question, whether of fraud or otherwise, must be tried and decided by the judge, justice, or commissioner. But, in most if not in all such cases, the legislature have taken care to provide, that by appeal or in some other form, the case may be brought before a court of common law jurisdiction, where a trial by jury may be had. In this case, the appeal is sustained, and the cause is ordered to stand for trial.

Commonwealth *vs.* Betsey Hunt.

4c 49
157 75

Where a husband obtained a divorce from the bond of matrimony, for the cause of utter and wilful desertion by the wife, for the term of five years consecutively, without his consent; and the wife afterwards went into another state, and was there married to another man, with whom she returned to this state and here lived and cohabited; it was held, that if the wife was guilty of any offence under the Rev. Sts. c. 130, she was indictable under the second section for unlawful cohabitation, and not under the fourth section for lewd and lascivious behavior.

The defendant was indicted in the court of common pleas, and there tried before *Hopkinson*, J., for lewd and lascivious cohabitation with Oliver Davis, Jr., at Prescott, in the county of Hampshire, between the 1st of March, 1848, and the 1st of February following; the defendant being then the wife of Warren Hunt, and not married to Oliver Davis, Jr.

At the trial, a copy was introduced in evidence, on behalf of the commonwealth, of a record of a decree of divorce from the bond of matrimony between Warren Hunt and the defendant, obtained by Hunt at the April term of this court,

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1847, upon the default of the defendant, for the alleged reason, that the defendant had wilfully and utterly deserted him for the term of five years consecutively without his consent.

The defendant offered evidence, which was rejected, to prove that she was married to Oliver Davis, Jr., on the 9th of February, 1848, at Vernon, Windham county, Vermont, according to the laws of that state.

The jury were instructed, that the record of the decree of divorce was conclusive evidence, that the defendant was the guilty party; that she was therefore precluded by the act of 1841, *c.* 83, from contracting a valid marriage, within this commonwealth, during the life of Warren Hunt; and that the alleged marriage in Vermont would be void in this state.

The defendant, being convicted, alleged exceptions.

J. W. Boyden, for the defendant.

Clifford, attorney general, for the commonwealth.

Dewey, J. If the facts in this case afford ground for any indictment under the Rev. Sts. *c.* 130, it would be more properly an indictment upon the second section, for unlawfully cohabiting within the state, with Davis, as husband and wife, the defendant having a former husband living, and not coming within the exception of the third section, as a person "not the guilty cause of such divorce." The offence of lewd and lascivious behavior, made punishable by the fourth section, does not, we think, embrace a case like the present. *Commonwealth* v. *Putnam*, 1 Pick. 136. Had the defendant been indicted under the second section, the question would then have arisen, as to the effect of the marriage in Vermont; and it would have been necessary to consider more particularly the present state of our law in relation to such marriages.

That a marriage, valid by the laws of the place where it is celebrated, is valid in this state, on grounds of public policy, though the parties went into another state merely to evade the laws of the state, is established in the cases of *Medway* v. *Needham*, 16 Mass. 157; *West Cambridge* v. *Lexington*, 1 Pick. 506; *Putnam* v. *Putnam*, 8 Pick. 433; *Sutton* v *Warren*, 10 Met. 451. The provision of the Rev. Sts. *c.* 75, § 6,

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seems to have been intended to meet this class of cases, that is, of individuals fraudulently attempting to evade the law of Massachusetts, so far as respects persons divorced for the cause of adultery, and to declare such marriages by the guilty party to be void in this commonwealth.

But that section did not originally embrace the case of a party divorced by reason of five years' utter and wilful desertion. Such a divorce was not authorized until the passing of the statute of 1838, *c.* 126; in which, as to future marriages by either of the parties, no disqualifying clause was added. By the statute of 1841, *c.* 83, it was provided, that the guilty party should be debarred from contracting marriage during the lifetime of the innocent party, and that if the guilty party should contract such marriage, the same should be void, and such party should be adjudged guilty of polygamy. But this statute only applies, in terms, to marriages within the commonwealth; and in reference to such, is full and explicit, making them void. It is only by implication, that we can extend these statute provisions to cases like the present, where the guilty party, who has been divorced, has subsequently gone from this commonwealth into a neighboring state, and been there married, and has then returned into this commonwealth, and here cohabited with the person to whom he or she has been thus married in another state. The adjudicated cases, above cited, would seem fully to sustain the validity of the marriage in Vermont, if it had taken place prior to the enactment of the Rev. Sts. *c.* 75, § 6; and the only question upon this point, therefore, arises upon the construction of that statute, taken in connection with the statute of 1841, *c.* 83. Upon this point, as the case does not require it, we express no opinion further than the remarks already made. *Exceptions sustained.*

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Commonwealth *vs.* James Sloan & another.

An allegation, in an indictment against two, for selling spiritous liquors without license, and in contravention of the Rev. Sts. *c.* 47, that the defendants "did presume to be a retailer of wine, brandy, rum and other spiritous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, without being first licensed as a retailer of wine and spirits, according to law," is a sufficient averment that the defendants were neither jointly nor severally licensed, and will support a verdict of guilty against one alone.

Two or more persons may be jointly charged, in the same indictment, with the offence of selling spiritous liquors, without license.

It is no justification for the sale of spiritous liquor without license, that, at the time of such sale, there was no druggist or other person licensed to sell spiritous liquors within the county; that the sale was made upon the order or prescription of a physician; and that the liquor thus obtained was necessary for the buyer's use, either as a medicine, or for the preservation of his health.

The defendants, James Sloan and Thomas Tilton, were indicted in the court of common pleas, and there tried before *Hopkinson*, J., for selling spiritous liquors, without license, in contravention of the Rev. Sts. *c.* 47. The indictment contained four counts, in each of which it was alleged that the defendants, on the day and at the place named therein, "did presume to be a retailer of wine, brandy, rum and other spiritous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, without being first licensed as a retailer of wine and spirits, according to law, and did then and there sell," &c.

The defendants moved that the indictment be quashed: 1st. Because it charged no offence; 2d. Because the offence charged, if any, was set out in an insensible, uncertain and insufficient manner. This motion was overruled and the trial proceeded.

It being in evidence, among other things, that the defendants were partners in business, in Northampton, as grocers, it was objected, that if the jury should acquit Sloan, they could not convict Tilton. But the jury were instructed otherwise, and returned a verdict of guilty against Tilton, and found Sloan not guilty. Tilton thereupon alleged exceptions.

C. Delano, for the defendants.

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Clifford, attorney general, for the commonwealth.

DEWEY, J. The offence is well charged in this indictment, according to the decision in the case of the *Commonwealth* v. *Thurlow*, 24 Pick. 374, unless the objection taken to the averment as to the license is valid. This objection, which is also relied upon, is, that there is no proper averment, that the defendant Tilton, against whom the verdict was rendered, was not duly licensed as a retailer of wine and spirits according to law. It is said, on the part of the defendant, that the indictment only negatives a joint license, and is perfectly consistent with a separate license to Tilton. But this, we think, is not a correct view of the matter. The allegation may be properly taken to be broad enough to embrace a license in its most extended sense; a license to both defendants, either jointly or severally. Had Tilton alone been licensed to sell spirits, upon the proof of that fact, he must have been acquitted; for the allegation in the indictment, "without being first duly licensed as a retailer," would have been disproved. The case of the *Commonwealth* v. *Tower*, 8 Met. 528, is quite analogous upon this point. In that case, it was held, that an allegation negativing a license to both might be taken to apply to the defendants individually as well as jointly. The same case is a direct authority upon the point, that two or more persons may be jointly charged in the same indictment for a sale of spiritous liquors without license.

Exceptions overruled, and judgment on the verdict.

On the trial of a second indictment against the same defendants, for selling spiritous liquors without license, it being in evidence, that the defendants uniformly refused to sell, except upon a physician's order or prescription; that in the case of each of the sales alleged in the indictment, the buyer brought such order or prescription; and that at the time of these sales, there was no druggist or other person licensed to sell spiritous liquors within the county of Hamp-

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shire; the defendants requested the court to instruct the jury that, if they were satisfied of the truth of these facts, the defendants were justified in making the alleged sales, on the ground, that the liquors sold were for a medicine, and the preservation of health.

The court refused to give the instructions requested, but directed the jury, that the defendants could not lawfully retail spiritous liquors, as alleged in the indictment, however strong a necessity there might be for the buyer's using it as a medicine, or for the preservation of health, without a license first obtained according to law.

The defendants, being convicted, alleged exceptions, which were overruled in this court; and judgment was thereupon entered on the verdict.

WILLIAM HUNT *vs.* CAROLINE A. FROST, Administratrix.

Where two parties enter into a mutual agreement, which is evidenced by a paper signed by each and given to the other, the two instruments are to be taken and construed together as one.

An agreement, by an administrator or guardian, to offer the real estate of his intestate or ward for sale by auction, and to sell the same to a particular individual, for an agreed price, provided no higher sum should be bid, is valid. But such an agreement to sell the estate at a fixed price, without regard to the biddings, is fraudulent and void.

THIS was an action of assumpsit brought by the plaintiff against the defendant, as administratrix of George Frost, and was tried before *Dewey*, J., in this court.

The declaration contained two special counts, in one of which the promise declared on was alleged to have been made by the defendant, "as the administratrix of George Frost," and in the other by "the said Caroline A." Both counts were to recover damages for the breach of the following agreement:—

"In consideration of one dollar to me paid by William Hunt, 2d, I promise and agree to sell to said Hunt, under the direction of the court of probate, at such time as shall be

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permitted, the following described lot of land, belonging to the heirs of Dr. George Frost, viz.: sixty feet front on Spring street, running back the entire width of the lot of land lying north of the old house, being the first lot of land according to a plan now in my possession," for which said Hunt agrees to pay the sum of four hundred dollars, two hundred dollars on the delivery of the deed, and two hundred to remain on mortgage five years;" dated "Springfield, March 6th, 1847," and signed "W. Thompson, attorney and agent for Caroline A. Frost, administratrix of George Frost."

At the trial, it appeared in evidence, or was admitted, that Dr. George Frost, the owner of the lot of land described in the foregoing agreement, deceased intestate, leaving the defendant, his widow, and two minor children, Caroline L. Frost and George L. Frost; that the defendant was duly appointed administratrix on the estate, and guardian of her son, George L. Frost; and that Wellington Thompson, esquire, was duly appointed guardian of the daughter, Caroline L. Frost.

It also appeared, that at the time of the execution and delivery of the agreement above mentioned, the following writing was executed by the plaintiff, and delivered by him to Thompson for the defendant:

"In consideration of one dollar to me in hand paid by W. Thompson, agent and attorney for Caroline A. Frost, administratrix of George Frost, I agree to purchase at public auction, at such time as the court of probate shall permit," the lot described in the agreement above mentioned, "and to pay therefor the sum of four hundred dollars, two hundred on the delivery of the deed and two hundred dollars in five years from date, and secure the same by mortgage. Springfield, March 6th, 1847."

It also appeared, that on the 2d of March, 1847, before the making of the agreement, Thompson as guardian of Caroline L. Frost, and the defendant as guardian of George L. Frost, presented separate petitions to the court of probate for the county of Hampden, for license to sell the shares of their respective wards in certain real estate descended to

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them from their father, including the lot in question; and that on the 6th day of April, 1847, such license was duly granted; that Thompson and the defendant offered the real estate of their wards for sale at public auction, on the 1st of May, 1847, pursuant to the license of the probate court; and that the lot in question, after several bids by the plaintiff and others, was finally struck off to the plaintiff for the sum of $600; that the plaintiff, on the 18th of March, 1848, duly tendered to the defendant $200 in money, and notes, and a mortgage of the land for $200 more, according to the agreement declared on; but that the defendant declined to make a conveyance to the plaintiff for that amount.

The defendant objected that the contract declared upon was void or voidable for illegality, and that the plaintiff could not recover damages for any breach of it. But the presiding judge, for the purposes of the trial, ruled otherwise, and reserved the question for the full court. The jury returned a verdict for the plaintiff for $200.

The case was argued at the September term, 1848.

H. Morris, for the defendant.

R. A. Chapman and *W. G. Bates*, for the plaintiff.

Shaw, C. J. There are so many objections to the maintenance of this action, that the difficulty seems to be, rather in selecting the most decisive, than in finding an adequate one.

1. In the first place, the defendant is sued as administratrix. She is not only so described in the writ, but in the first special declaration she is alleged to have made the promise declared on as the administratrix of George Frost. But this is a promise, which, in her representative capacity, she had no power to make; nor could she bind the estate of her intestate by it. The decision in *Fairfield* v. *Williams*, 4 Mass. 427, is not an authority for this case; there the administrators bound themselves, in their own right, to procure and convey a good title, and were sued in their private capacity It was decided on the pleadings without argument.

2. The promise to sell under the direction of the probate court, and at such time as such court would permit, is mani-

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festly conditional. Knowing what the nature of the authority and jurisdiction of the court of probate is, the stipulation must be understood provisionally, viz., to make such conveyance, if the court of probate will give such direction and grant such permission. No such license or authority was ever granted to her, in her capacity as administratrix. No want of the proceeds, for payment of debts, is shown to exist, and no case requiring or warranting such a license. The license granted to her in another capacity, as guardian of one of her children, jointly with Thompson, the guardian of the other child, is not a fulfilment of the condition. It is not stated in the declaration, that any license was ever granted to the defendant, as administratrix, to sell the estate of the intestate for payment of debts or otherwise. It appears that the plaintiff did not consider the sale at auction made by the defendant and another person, as guardians, to be the sale contemplated in his agreement, because he attended and bid off the land at a sum beyond that stipulated by the agreement; or, if he did consider it the same, the bidding of a larger sum would seem to be a waiver of the agreement.

3. But without suggesting further objections, which may be considered technical, we prefer to consider the question on its merits.

In order, then, to understand what the objection of the defendant was, it is necessary to take the two papers, signed and mutually exchanged at the same time, and constituting together parts of one and the same agreement.

The part of the contract which was signed by the plaintiff and given to the defendant is, in consideration of one dollar paid by her, as administratrix, &c., an agreement to purchase, at such time as the court of probate shall permit, the property (described), and to pay therefor the sum of $400, &c. It is difficult to understand what the parties intended. A stipulation to purchase an estate at auction, at a fixed price, seems to be something like a contradiction in terms, because an auction implies a free competition amongst bidders, which must leave the price uncertain, until ascertained by the event.

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The stipulation, on the part of the defendant, to sell to the plaintiff, does not, in terms, engage her to sell at auction; but when it is considered, that an administratrix can sell in no other mode, and that her undertaking is to be construed with his, the construction of her stipulation would seem to be, to sell at auction. This would involve the same absurdity of a promise to sell at auction at a fixed price, when an auction implies an uncertain price, until fixed by the close of the biddings.

Taking this to be their agreement, and in order to give a reasonable construction to it, it has occurred to us to construe it to be a stipulation, on the plaintiff's part, to offer at auction the sum of $400, and a stipulation, on the part of the defendant, to offer the land at auction, and to sell it to the plaintiff at $400, if no one should bid higher. Such an agreement would be consistent with the duty of an administrator or guardian, and might be a reasonable precaution to prevent the estate from being sold at a price greatly below its value. But, of course, if such were the legal effect of the agreement, it must have been with the understood condition, on both sides, that if any one should bid higher, the agreement would be at an end. Nor would this be injurious to the party intending to purchase, because he would not be restrained by his agreement from bidding more than the stipulated sum, in competition with other bidders. If such was the legal effect of this agreement, it is very clear that there was no breach of the defendant's promise, because the biddings at auction alleged by the plaintiff to be the auction contemplated did exceed $400. But perhaps this was not the understanding the parties had of the legal effect of their agreement, and we have not thought it necessary to put the decision upon that ground.

4. But, taking the case as it has been presented to us, that of an administrator or guardian proposing to sell the estate of an intestate or ward under a license of court; and the former should stipulate to sell, under the forms of an auction, and the other party to buy, at a fixed price, without regard to the biddings to be made at such auction; the court are all of

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opinion that such an agreement would be fraudulent and void.

The law supposes that the administrator or guardian has no interest of his own to pass by deed; that he executes a mere naked power, vested by law in such persons, acting officially, and this upon very strict conditions. If the conditions are not complied with, the power is not well executed, and no estate passes by the deed.

All the statute directions are framed with a view to insure a perfect, unrestrained and honest competition amongst purchasers, and thus to obtain the highest price. Every such sale is required to be made by public auction. Rev. Sts. *c.* 71, § 17. Public auction, *ex vi termini*, is an open, public, free sale, at a time and place fixed by long, wide spread and ample notice specially prescribed. The sale may be adjourned. §§ 17, 18. Public notice of the time and place is to be given. § 15. The administrator, before fixing on a time and place of sale, is required to take and subscribe an oath, that in disposing of the estate, he will use his best judgment, in fixing on the time and place, and exert his utmost endeavors to dispose of the same, in such a manner as will be most for the advantage of all persons interested therein. These provisions are all inconsistent with the idea that he can sell by private contract, or make such a bargain, as in effect to limit and fix the price by private contract, under the forms of an auction sale.

If such a contract were held valid, it would create a direct interest, on the part of the guardian or administrator, to prevent the biddings from rising higher than the stipulated price, and would be in that respect contrary to his duty and his oath. Being contrary to public policy, in a matter designed to protect the rights of those who are wholly incapable of protecting themselves, it is not voidable only, but void.

It was stated, on the opening of the argument for the defendant, that if the agreement was fraudulent, the fraud was all on the side of the defendant; because the plaintiff did not know that she was an administratrix. It would seem, that in making this statement, the learned counsel overlooked

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the obvious fact, that the stipulation, on which the plaintiff relies and brings his suit, was signed for the defendant, by her attorney, "as administratrix of George Frost;" and in the paper simultaneously executed by him and delivered to her, he stipulates with her as the administratrix of George Frost, to purchase of her, at public auction, at such time as the court of probate shall permit.

Taking this as a contract, which could only be made by the defendant, as administratrix or guardian, by license of court, and that by auction to the highest bidder; if it was a contract to sell to him at the sum named, if no one should bid higher, it has not been broken, because others did bid higher. If it went further, and amounted to an absolute undertaking to sell to him, at a fixed price, in the event that others should bid higher, as they in fact did, it was contrary to law, contrary to public policy, a fraud upon others, in the execution of a trust created by law for the benefit of persons incapable of protecting their own rights, and as such, a contract which the law will not lend its aid to enforce.

Zelotes Lumbard *vs.* Charles Stearns.

4c 60
150 596
4c 60
158 522
4c 60
171 334

An act of the legislature, by which certain persons were incorporated as an aqueduct company, for the purpose of supplying a village with pure water, with authority to take springs, lands and rights, and subject to the payment of damages therefor as provided by law in the case of land taken for highways, is not unconstitutional, on the alleged ground, that it authorizes the taking of private rights of property for a use which is not public; although it contains no express provision requiring the corporation to supply, on reasonable terms, all persons applying for water.

If an aqueduct corporation, established for the purpose of supplying a village with pure water, should undertake, capriciously and oppressively, to enhance the value of certain estates by furnishing them with a supply of water, and depreciate that of others by refusing it to them, such conduct would be a plain abuse of their franchise.

The facts of this case, which was a bill in equity for an injunction, are stated in the opinion of the court.

R. A. Chapman and *W. G. Bates*, for the plaintiff.

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H. Morris, for the defendant.

SHAW, C. J. This bill was originally brought by the plaintiff as an owner of mills on the lower part of Town brook, in Springfield, against the defendant Stearns, alleging that by means of an aqueduct, on his own land, he had diverted some portion of the water of two springs, being some of the sources of said brook, and thereby diminished the plaintiff's water power. Whilst this bill was pending and before answer filed, an act was passed by the legislature on the 10th of May, 1848, (*St.* 1848, *c.* 303,) entitled "An act to incorporate the Springfield Aqueduct Company."

This act authorized the taking of the springs before mentioned of Stearns, by purchase, and with certain other springs, the laying of an aqueduct for the purpose, expressed in the act, of supplying the village of Springfield with pure water. The act contains the provisions usual in such acts, for forming a company and raising a capital; for taking springs and lands, paying all damages; for digging up roads and ways; providing hydrants; for a gratuitous supply of water, in case of fire; a penalty for corrupting the water; and vesting certain superintending powers in the board of health of Springfield, and the county commissioners of Hampden, respectively. After the passage of this act, a supplemental bill was filed, making the aqueduct company a party, and insisting on the same grounds against them, as stated in the original bill.

It is contended, that this act is unconstitutional and void, because it in effect authorizes the corporation to take private rights of property for a use which is not a public one, and, therefore, not within the authority of the legislature, even though provision is therein made for a compensation for any such damage. It may be very questionable, whether the plaintiff, taking the use of the brook for a mill power, does not take it subject to the reasonable use of all proprietors above, in or near whose premises it passes, for domestic purposes, for such ordinary trades as require the use of water, such as tanning, bleaching, dyeing, and the like, and also for the extinguishment of fires. If such be the right of the inhabitants to the use of the water, it may be a question,

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whether it is a greater encroachment on the plaintiff's rights, to take water by conduits and hydrants, than by buckets and engines. But as this right may involve a question of fact, which this case has not reached, in its present stage, we lay no stress on this consideration, but merely suggest it in passing.

But we can perceive no ground, on which to sustain the argument, that this act does not declare a public use. It is so expressed in its title, and in the first enacting clause, and the entire act is conformable to this view. The supply of a large number of inhabitants with pure water is a public purpose. But it is urged, as an objection to the constitutionality of the act, that there is no express provision therein requiring the corporation to supply all families and persons who should apply for water, on reasonable terms; that they may act capriciously and oppressively; and that by furnishing some houses and lots, and refusing a supply to others, they may thus give a value to some lots, and deny it to others. This would be a plain abuse of their franchise. By accepting the act of incorporation, they undertake to do all the public duties required by it. When an individual or a corporation is guilty of a breach of public duty, by misfeasance or nonfeasance, and the law has provided no other specific punishment for the breach, an indictment will lie. Perhaps also, in a suitable case, a process to revoke and annul the franchise might be maintained. But it is the less important to determine this question, because this charter is subject to the provision in the Rev. Sts. *c.* 44, § 23; by which it is competent for the legislature to make such alterations and amendments, as more effectually to carry into effect all the purposes of the act.

The court are of opinion that this act is not open to the objections made to it, and that it is not unconstitutional.

Bill dismissed.

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The Inhabitants of Springfield *vs.* The Connecticut River Railroad Company.

Where a railroad corporation, under a general grant of power, lay out and construct their road over and along a public highway, the town, within which such highway is situated, may proceed in equity against the corporation in this court, under its general jurisdiction in matters of nuisance, in order to ascertain whether such laying out and construction is or is not within the power granted to the corporation; and it is immaterial, in this respect, whether the way in question be a highway, properly so called, or a town way.

The fourth section of the act of 1849, *c.* 222, which gives county commissioners jurisdiction of all questions touching obstructions to highways by railroads, if it does not relate exclusively to the raising or lowering of such ways when crossed by a railroad, which the court did not decide, has no effect to deprive this court of its jurisdiction of a case commenced therein before the passing of the act.

Where a town was divided, and a part of it established as a new town, after the commencement of a suit in equity by such town against a railroad corporation, for a nuisance to a public highway, which, upon the division, fell within the limits of the new town, and the act for the division provided that such suit should be assumed, and might be prosecuted to final judgment, by the new town, at their expense and for their benefit, but in the name of the old town; it was held, that the division did not operate to vacate or otherwise affect the suit.

An act of the legislature, which authorizes the construction of a railroad between certain *termini*, without prescribing its precise course and direction, does not *prima facie* confer power to lay out the road on and along an existing public highway; but it is competent to the legislature to grant such authority, either by express words, or by necessary implication; and such implication may result either from the language of the act, or from its being shown, by an application of the act to the subject matter, that the railroad cannot, by reasonable intendment, be laid in any other line.

4c 63
148 390
4c 63
152 63
4c 63
154 425
4c 63
156 176
4c 63
167 50
4c 63
173 410

This was a bill in equity, in which the plaintiffs set forth, that so much of Front street, in the village of Cabotville in the town of Springfield, as extended from the southerly end of Cabotville bridge westerly to the north end of Cabot street, was established by the county commissioners, for the county of Hampden, as a highway, in October, 1834; that so much of Front street as extended from the north end of Cabot street, westerly to Dwight street, was laid out by the selectmen and accepted by the town of Springfield, and the same established as a town way in April, 1841; that Front street, so established as a county and town way, had ever since been and still was used by the citizens of Springfield and the public generally as a highway, and that several

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streets, containing a large population, and much travelled over, opened into Front street, and that the same was constantly passed and repassed by a great amount of travel, consisting of foot passengers, carriages, teams, &c.; that that part of the Connecticut River Railroad Corporation, which was then known as the Northampton and Springfield Railroad Corporation, did, in the year 1845, illegally and without right, lay down and construct, through the entire length of Front street, a portion of their track, being a part of the branch extending from the main track to the villages of Cabotville and Chicopee Falls; that the track through Front street had ever since been and still was used by the defendants, and the defendants were daily running a great number of trains of cars, drawn by a locomotive engine at a great rate of speed, upon and over said track; that the defendants by so doing rendered the travel through Front street unsafe and inconvenient, and greatly obstructed and incumbered the same, and constantly endangered the lives and property of all persons having a right and wishing to pass through said street, and that such illegal obstructions constituted a grievous and insufferable public nuisance; that the defendants thereby rendered the plaintiffs constantly liable for double damages for all injuries to persons and property caused by such obstructions, while the plaintiffs could only recover of the defendants the actual damage so caused, whenever the plaintiffs might be compelled to pay double damages; that the plaintiffs had requested the defendants to remove their track, or to erect suitable barriers by the side of the same, and to give the plaintiffs sufficient indemnity against all damages caused to the plaintiffs by said track, and the use thereof; and that the defendants entirely neglected and refused so to do. The plaintiffs, therefore, prayed that the defendants might be restrained by injunction from longer running their cars and locomotive engines upon and over their track through Front street.

The defendants, in their answer, admitted the use of Front street as a highway, and the laying out and construction of their branch track along said street; but alleged that it was

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mostly on the northerly side thereof, aside from the worked and travelled part, and that the same was daily used for running cars drawn by a locomotive engine at a moderate rate of speed; and denied that they did the same illegally and without right; or that they had thereby rendered the travel through Front street unsafe and inconvenient, and obstructed and incumbered said street, and endangered the lives and property of persons having a right and wishing to pass through said street; or that they had thereby created a nuisance, or rendered the plaintiffs liable for double damages; but they admitted the request as to the removal of said track, and as to barriers and indemnity: And they further alleged, that in the location and construction of said track they had complied with the requisitions of *St.* 1845, *c.* 170, § 1; that it was necessary and expedient to adopt the location complained of, and there to construct and maintain their road; and that as to such location, construction and maintaining, and the running of cars and engines, and all other matters complained of, they had acted under the authority granted to them by the legislature, and in conformity with the laws of the commonwealth.

The plaintiffs filed a general replication.

The act of 1848, *c.* 233, passed after the filing of the bill, in this case, but previous to the answer, to incorporate a part of the town of Springfield, including the highway in question, into a separate town, by the name of Chicopee, provided (§ 3) that "The suit in equity, now pending in favor of said town of Springfield, against the Connecticut River Railroad Company, shall be assumed, and may be prosecuted to final judgment, by said town of Chicopee, in the name of said town of Springfield, at the expense and for the benefit of said town of Chicopee."

By the act of 1845, *c.* 170, § 1, under which the defendants claimed authority to lay out and construct the railroad in question, in the manner complained of, they were authorized to construct and open for use, a branch railroad, from the main track of their road, in the village of Cabotville, to and near the mills in said village, passing up the south bank of

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Chicopee river, near the same, and thence extending up said river into the Chicopee Falls village. The third section declares, that in such construction, the defendants may exercise all the powers and privileges, and shall be subject to all the duties, restrictions, and liabilities, set forth in the general laws relating to corporations.

G. Walker, for the plaintiffs.

The act of 1845, *c.* 170, gives no express authority to the defendants to occupy a highway; nor do the circumstances imply any such authority. It does not appear that the road could not be constructed any where else. See *Thacher* v. *Dartmouth Bridge Co.* 18 Pick. 501; *Boston Water Power Co.* v. *Boston & Worcester Railroad Corp.* 23 Pick. 360; *Commonwealth* v. *Coombs*, 2 Mass. 489; *Wales* v. *Stetson*, 2 Mass. 143; *Commonwealth* v. *Stevens*, 10 Pick. 247; *West Boston Bridge* v. *Middlesex*, 10 Pick. 270; *Wellington* v. *Middlesex*, 16 Pick. 87, 89, 104; *Kean* v. *Stetson*, 5 Pick. 492; *Commonwealth* v. *Charlestown*, 1 Pick. 180; *Arundel* v. *McCulloch*, 10 Mass. 70. The defendants have no such authority under the general laws of the state, in the absence of any specific authority. *Boston Water Power Co.* v. *Boston & Worcester Railroad Corp.* 23 Pick. 360, 398; *St.* 1837, *c.* 185, §§ 4, 5. The act of 1846, *c.* 271, does not apply. The town is liable for double damages to a party injured. *Currier* v. *Lowell*, 16 Pick. 170. But the corporation is only liable for single damages to the town. *Lowell* v. *Boston & Lowell Railroad Co.* 23 Pick. 24.

C. P. Huntington, for the defendants.

The defendants were not only authorized, but required, to build the road where it is located. *St.* 1845, *c.* 170, § 1. Rev. Sts. *c.* 39, §§ 46, 47, 48. To the point, that under a general power, highways may be obstructed, see *Newburyport Turnpike Co.* v. *Eastern Railroad Co.* 23 Pick. 326; *Lowell* v. *Boston & Lowell Railroad Co.* 23 Pick. 24; *Wales* v. *Stetson*, 2 Mass. 143; *Boston Water Power Co.* v. *Boston & Worcester Railroad Corp.* 23 Pick. 360; *Commonwealth* v. *Worcester Turnpike Co.* 3 Pick. 327; *Coomes* v. *Burt*, 22 Pick. 422; Roscoe, Cr. Ev. 516, 742; *The King* v. *Pease*,

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4 B. & Ad. 30; *The King* v. *Ouze Bank Commissioners*, 3 A. & E. 544.

The act of 1849, *c.* 222, § 4, has ousted the jurisdiction of this court, except as a court of appeal; and has a retroactive operation. *Springfield* v. *Hampden*, 6 Pick. 501. And see *St.* 1849, *c.* 159; *Bemis* v. *Upham*, 13 Pick. 169.

R. A. Chapman, also for the defendants.

The bill states no case for an injunction; it alleges a public nuisance, which is no ground for maintaining this suit, without showing a special private injury. *Bigelow* v. *Hartford Bridge Co.* 14 Conn. 565; 3 Dan. Ch. Pr. 1858; *Rowe* v. *Granite Bridge Corp.* 21 Pick. 344; *Stetson* v. *Faxon*, 19 Pick. 147, 154. The liability to double damages is not a ground of such special injury, being too contingent. And the injury should be one which cannot be compensated in damages. *Dana* v. *Valentine*, 5 Met. 8; *Ingraham* v. *Dunnell*, 5 Met. 118; *Atkins* v. *Chilson*, 7 Met. 398.

This proceeding is vacated by the passing of the act incorporating the town of Chicopee. *St.* 1848, *c.* 233.

H. Morris replied. By the third section of the act referred to, this suit is expressly saved.

Shaw, C. J. This is a bill in equity, brought to enjoin the defendants from maintaining a railroad and running cars thereon, upon and over a public highway in Springfield, on the ground, that such maintenance of the railroad is unauthorized, and constitutes a nuisance. It presents a very important question; one, which, in the great multiplication of railroads, is likely to affect deeply the interests of many parts of the commonwealth, and which has not yet been decided.

A preliminary objection was taken, that the inhabitants of a town, in their corporate capacity, have no such interest in the preservation and protection of the highways and town ways, within their limits, as will warrant them in applying to this court, for the exercise of its jurisdiction, in case of nuisances, to restrain and prevent such nuisance. We have not examined the subject very thoroughly, but we are inclined to think, that as the town is responsible for the construction and amendment of highways and town ways, and

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for damages to travellers for losses occasioned by obstructions and defects, they have a right to invoke the equity power vested in this court, in cases of nuisance, to determine whether such a use of the ways, as is claimed by the defendants in the present case, is or is not a justifiable act under the powers granted them.

It is further contended, that the original jurisdiction of this court, if it ever existed, is taken away by the statute of 1849, c. 222, by which (§ 4) the original jurisdiction of all questions touching obstructions to turnpikes, highways, or town ways, caused by the construction or operation of railroads, is vested in the county commissioners. This provision, taken in connection with the preceding section, we think, relates to the raising or lowering of bridges, ways or the like, when crossed by a railroad, so as to adapt them to each other, and to render such crossings safe; and does not vest in the commissioners the jurisdiction of deciding, whether the railroad is laid down or located in conformity with the grant of power given in the act of incorporation. But whether such be the true construction of the act or not, it would not affect this case, which was commenced long before that act passed; and the jurisdiction having once attached, it will not be held to be taken away by a subsequent act, without express words, nor then if vested rights would thereby be affected.

The fact, that since the suit was commenced, the town of Springfield has been divided, and that the place where the nuisance is alleged to exist falls within the new town of Chicopee, has no effect to vacate the suit; because the act of incorporation contains a saving clause, which is sufficient to avoid any such effect.

We are then brought to the main question, namely, whether the defendants had authority, by the act of 1845, c. 170, § 1, granting them the right to build this branch, to build it over and along a public way previously established It is stated and admitted, that Front street, in Cabotville, is partly a highway laid out and established by the county commissioners, and partly a town way laid out by the selectmen, and the laying out ratified by the vote of the

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town. These two modes of establishing ways are both legal; and though one is called a highway, and the other a town way, yet, for most purposes, both are regarded as public ways, for obstructing which, any party is liable to indictment as for a nuisance, and for damage in consequence of any defect in which the town is liable to the sufferer. For all purposes of this inquiry, therefore, there is no distinction between them.

As the giving of authority to build and maintain a railroad is the grant of a right to take private property for a public use, and to deal with property appropriated to other public easements and uses, it is manifestly a high exercise of the sovereign right of eminent domain, and can only be effected by the clear and unequivocal authority of the legislature, who are constituted the judges of what the public good requires.

It is somewhat remarkable, that in a matter so deeply affecting private rights and interests, the precise location or line of railroad, on the ground, is not fixed by the act granting the power, nor is it provided, that it shall be fixed by any board of public officers, who may be supposed to act impartially. In laying out highways, the precise course of location is fixed by the county commissioners, formerly the court of sessions, a public body of disinterested officers, supposed to act as impartial arbitrators between the public and individual proprietors.

But in railroads, the authority to the corporation is, to locate, construct and complete a railroad within certain *termini*, giving the general direction, but leaving the precise location to be determined, not by the county commissioners, but by the company. The corporation must file their location with the commissioners within one year, defining the courses, distances and boundaries, but the commissioners have no power of prescribing or altering it. Rev. Sts. *c.* 39, § 75. So, after having made a location, the corporation may vary it, and take other lands within the limits prescribed by their act of incorporation, and file a location of such variations. Rev. Sts. *c.* 39, § 73. And, on the petition of

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any railroad corporation, the commissioners may authorize an original location, or an existing location to be altered, without the limits prescribed by the charter of such corporation. Rev. Sts. *c.* 39, § 74. Considering how large the powers are, which are thus vested in railroad corporations, the court are of opinion, that they ought to be construed with a good degree of strictness, and not enlarged by construction.

The authority, under which the defendants claim to have located and laid out the railroad in question, is found in the act of 1845, *c.* 170, which was passed in addition to the act of 1842, *c.* 41, by which this company was incorporated. The act of 1845 provides (§ 1), that the company may construct and open for use a branch railroad from the main track of the road, in Cabotville, to and near the mills in said village, passing up the south bank of Chicopee river, near the same, and thence extending up said river to the Chicopee Falls village; the location of that part of the branch now in question, from the main road to the mills in Cabotville, to be filed in one year from the passage of the act, and that to Chicopee Falls village in five years. The act further provides (§ 3), that said corporation, in the construction of their railroad and branch, shall have all the powers and privileges, and be subject to all the duties, restrictions and liabilities, set forth in the Rev. Sts. *c.* 44, and in that part of *c.* 39 which relates to railroads.

It is the common case of an act, authorizing the location and construction of a railroad between *termini*, one of which, the junction, as the *terminus a quo*, is fixed, and the other, the *terminus ad quem*, "to and near the mills in Cabotville:" and the course or line is no more exactly designated, than by the terms, "passing up the south bank of Chicopee river, and near the same," and thence extending up said river to Chicopee Falls village. The beautiful and apparently accurate survey and plan of a part of Cabotville, and of the river, the streets, and the track of the railroad, exhibit all these localities to great advantage, and present the question at a single glance.

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As no company or persons have authority to lay out a railroad, except so far as such power is conferred by the legislature, the court are of opinion, that by a grant of power by a legislative act to lay out a railroad between certain *termini*, where the precise course and direction are not prescribed, but are left to the corporation to be located between the *termini*, no authority is given *prima facie* to lay such railroad on and along an existing public highway longitudinally, or in other words, to take the road bed of such highway as the track of their railroad. The two uses are almost, if not wholly inconsistent with each other; so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated. The whole course of legislation, on the subject of railroads, is opposed to such a construction. The crossing of public highways by railroads is obviously necessary, and of course warranted; and numerous provisions are industriously made, to regulate such crossings, by determining when they shall be on the same and when on different levels, in order to avoid collision; and when on the same level, what gates, fences and barriers shall be made, and what guards shall be kept to insure safety. Had it been intended that railroad companies, under a general grant, should have power to lay a railroad over a highway longitudinally, which ordinarily is not necessary, we think that would have been done in express terms, accompanied with full legislative provisions for maintaining such barriers and modes of separation, as would tend to make the use of the same road, for both modes of travel, consistent with the safety of travellers on both. The absence of any such provision affords a strong inference, that, under general terms, it was not intended that such a power should be given.

But the court are of opinion, that it is competent for the legislature, under the right of eminent domain, to grant such an authority. The power of eminent domain is a high prerogative of sovereignty, founded upon public exigency, according to the maxim: *Salus reipublicæ lex suprema est*, to which all minor considerations must yield, and which can

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only be limited by such exigency. The grant of land for one public use must yield to that of another more urgent. Land appropriated to a public walk or training field may, in case of war, be required for a citadel, when it is the only ground, which, in a military point of view, will command all the defences of a place, in case of hostile attack. *Chesapeake & Ohio Canal Co.* v. *Baltimore & Ohio Railroad Co.* 4 Gill & Johns. 1; *Boston Water Power Co.* v. *Boston & Worcester Railroad Corp.* 23 Pick. 360; *Wellington* v. *Middlesex*, 16 Pick. 87, 100.

But, when it is the intention of the legislature to grant a power to take land already appropriated to another public use, such intention must be shown by express words, or by necessary implication. There may be such a necessary implication. Every grant of power is intended to be efficacious and beneficial, and to accomplish its declared object; and carries with it such incidental powers as are requisite to its exercise. If, then, the exercise of the power granted draws after it a necessary consequence, the law contemplates and sanctions that consequence. Take the familiar case of the notch of the White mountains, a very narrow gorge, which affords the only practicable passage, for many miles, through that mountain range. A turnpike road through it has already been granted. Suppose the gorge not wide enough to accommodate another road, but the legislature of New Hampshire, in order to accommodate a great line of public travel, should grant power to lay a railroad on that line; they would by necessary implication grant a power to take some portion of the road bed of the turnpike.

In the present case, it is manifest, that there are no words in the act of 1845 which give the defendants authority to locate and construct their railroad over Front street, where it was actually laid, or over any other highway in Cabotville; and if they had the power, it must be derived from necessary implication, though no such implication appears on the face of the act. If it exist, it must arise from the application of the act to the subject matter, so that the railroad could not, by reasonable intendment, be laid in any other line. The

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grant of a right is, by reasonable construction, a grant of power to do all the acts reasonably necessary to its enjoyment. It is not an absolute or physical necessity, absolutely preventing its being laid elsewhere; but if, to the minds of reasonable men, conversant with the subject, another line could have been adopted between the *termini*, without taking the highway, reasonably sufficient to accommodate all the interests concerned, and to accomplish the objects for which the grant was made, then there was no such necessity as to warrant the presumption that the legislature intended to authorize the taking of the highway.

Whether the laying of this railroad, on and over Front street, was necessary, that is, reasonably necessary, as above explained, in order to accomplish the object contemplated by the legislature, depends upon the application of the act to the localities; and this warrants and requires evidence *aliunde* to establish the facts. It is a fit case, therefore, in our judgment, to be referred to three commissioners, of competent skill and experience in such subjects, to examine the whole subject, and to consider and report:—

Whether under the grant of an authority to the defendants to construct and open for use a branch railroad from the junction or main track of their road in the village of Cabotville, to and near the mills in said village, passing up the south bank of Chicopee river, near the same, and thence extending up said river into the Chicopee Falls village, it was, by fair and reasonable intendment, necessary to lay and construct the same upon and along Front street, or either of the public ways in Cabotville or not; and as incident to this inquiry, to consider, whether, by such fair and reasonable intendment, the said railroad could or could not have been laid out and constructed, 1st, between Front street and the canal; or 2d, over the canal; or 3d, between the canal and the mills; or 4th, between the mills and the bank of Chicopee river; considering for this purpose, the street, the canals, the mills, the land, and the entire space between the street and Chicopee river, as they were in March, 1845, when the act was passed by the legislature:

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Also, if they should be of opinion, that it was necessary to lay the railroad over Front street, where it now is, whether any, and if any, what further fences, gates, barriers, guards, or other precautions are required by the act of 1846, *c.* 271, in order to render it safe and convenient for the general travel, to pass through, over and across that street.

Commissioners appointed accordingly.

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COMMONWEALTH *vs.* OTIS TWITCHELL.

In an indictment on the Rev. Sts. *c.* 58, § 2, by which the setting up or promoting of any of the exhibitions therein mentioned, without license therefor, is prohibited, it is not duplicity to allege that the defendant "did set up *and* promote" such an exhibition.

If it is alleged, in an indictment on the Rev. Sts. *c.* 58, § 2, which imposes a penalty on any person, who shall set up or promote any exhibition to which admission is obtained by the payment of money, without a license first obtained, that the defendant did set up and promote such an exhibition (describing it) without being first duly licensed therefor, and contrary to the form of the statute, this is a sufficient allegation that the exhibition was unlawful, and was unlawfully set up and promoted.

In an indictment for setting up and promoting an exhibition prohibited by statute, it is a sufficient description of such exhibition, to allege that it "purported" to be an exhibition of certain performances.

THE defendant, being indicted in the court of common pleas for setting up a public exhibition in contravention of the provisions of the Rev. Sts. *c.* 58, §§ 1 and 2, was tried in that court before *Byington*, J., and convicted. He then moved in arrest of judgment; and, his motion being overruled, alleged exceptions.

The indictment set forth that the defendant "did set up and promote a certain exhibition and public show, to which said exhibition and show admission was obtained upon payment of money, to wit, the payment of twelve and a half cents, as said fee of admission, which said exhibition and show was an exhibition which purported to be an exhibition of the ventriloquial powers of a certain Mr. Wright, in which the said Mr. Wright should go through the whole of his wonderful performances, which have astonished thousands

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of spectators, the whole to conclude with the laughable farce of Freaks of Fancy, Punch and Judy, being ten mechanical automaton figures, representing nine voices; without being first duly licensed therefor, according to law: And the said Otis Twitchell did then and there admit divers citizens of this commonwealth, for a certain sum of money, to wit, the sum of twelve and a half cents, paid by each of said citizens, to him the said Otis Twitchell, to witness the said exhibition and show, to the great encouragement of dissipation and idleness, against the peace of the commonwealth aforesaid, and contrary to the form of the statute in such case made and provided."

The defendant alleged three grounds for his motion in arrest of judgment: 1st, That the indictment was bad for duplicity, in setting out two distinct offences; 2d, That it did not allege that the exhibition was an unlawful one, or was unlawfully set up and promoted; 3d, That it did not allege what the exhibition was, but only what it purported to be.

W. G. Bates, for the defendant.

Clifford, attorney general, for the commonwealth.

METCALF, J. 1. It is unnecessary to inquire, in this case, whether duplicity in an indictment is a cause for arresting judgment; because we are of opinion that the allegation, in this indictment, that the defendant "did set up and promote" an exhibition, does not make the indictment objectionable for duplicity, but charges only one offence. In *Commonwealth* v. *Eaton*, 15 Pick. 273, an indictment, which alleged that the defendant "did unlawfully offer for sale, and did unlawfully sell" a lottery ticket, was held good, on demurrer; and we cannot distinguish that case from this. So an indictment, which avers that the defendant "did write and publish, and cause to be written and published," a malicious libel, is not bad for duplicity. 2 Gabbett Crim. Law, 234; 3 Chit. Crim. Law (4th Amer. ed.), 877, *et seq.*

2. The Rev. Sts. *c.* 58, impose a penalty on any person who shall set up or promote any exhibition, to which admission is obtained by payment of money, without a license first obtained; and this indictment alleges that the defendant set

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up and promoted such an exhibition, without first being duly licensed therefor, and contrary to the form of the statute. This sufficiently shows that the exhibition was unlawful, and was unlawfully set up and promoted, without an express allegation that it was so. When the fact laid in an indictment appears to be unlawful, it is not necessary to allege it to have been unlawfully done, unless it be part of the description of the offence, as defined by statute. If the Rev. Sts. *c.* 58, had imposed a penalty on any person who should unlawfully set up or promote an exhibition, or should set up or promote an unlawful exhibition, this indictment would have been defective. 2 Hawk. *c.* 25, § 96; 1 Stark. Crim. Pl. (2d ed.) 78, 79.

3. The allegation that the exhibition purported to be an exhibition of certain performances, is all that was necessary, and perhaps all that was safe, to be inserted in the indictment. An allegation that the exhibition actually was what it purported to be — that is, what the defendant represented it to be — might have enabled him to escape through a variance between the allegation and the proof, though the exhibition, as made, was contrary to the statute. The show often falls short of the promise in the show bill.

Exceptions overruled.

WILLIAM H. CLEAVELAND *vs.* JOSIAH W. FLAGG.

Where land is conveyed "beginning at" and "bounding on land of B.," the point of beginning and boundary is the true line of B.'s land, and not the line of B.'s occupation as shown by a fence set up and maintained by B. before and after the conveyance, with the consent of the owner of the lot conveyed, under the mistaken belief that such was the true line.

Land being conveyed and described as bounding on the land of an adjoining owner, of a part of which the grantor was in fact disseized, such adjoining owner being then in the occupation of that part, under a mistaken belief of both that the line of occupation was the true line, the grantee entered and removed the fence from the supposed to the true line, and remained in possession accordingly; it was held, that the grantee, by way of rebutter and to avoid circuity of action, might avail himself of his title in defence to a writ of entry brought by the adjoining owner.

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Cleaveland v. Flagg.

THIS was a writ of entry, to recover a lot of land in Springfield, tried in this court before *Dewey*, J., and by him reported for the opinion of the whole court, in substance as follows: —

Both parties claimed through several mesne conveyances under Linus Hubbard, who, prior to November 1st, 1830, owned a large tract of land, embracing the lot in controversy. The demandant derived his title through the following conveyances. Linus Hubbard, by deed dated February 18th, 1834, conveyed to Cyrus Buckland a certain parcel of land in said Springfield, described as follows, viz.: "Beginning on Pine street at the north-east corner of land conveyed by me to Eunice Stephenson, thence northerly on Pine street fifty-nine feet, thence westerly to the north-east corner of the said Buckland's house lot, thence south by said Buckland's land to the said lot conveyed by me to the said Eunice Stephenson, thence easterly to the first-mentioned bounds." Cyrus Buckland, by deed dated August 30th, 1841, conveyed to the demandant "a certain tract or parcel of land, bounded west on Walnut street, north on land occupied by Linus Hubbard and a lot of Draper and Bailey, east on Pine street, and south on lands of Bradley and Elisha D. Stocking, containing about half an acre, more or less, with the buildings thereon, as now occupied by me."

The deed from Linus Hubbard to Eunice Stephenson, referred to in the deed from Hubbard to Buckland, bears date November 1st, 1830, and describes the premises thereby conveyed, being the lot next south of the demandant's land, as "beginning at the north-east corner of Daniel Field's house lot, on the west side of Pine street, thence running northerly on said Pine street one hundred feet to a stake and stones, thence westwardly by land belonging to the grantor to land of Elisha D. Stocking or Dudley Brown, thence southerly on land of said Stocking or Brown or both one hundred and thirty-five feet to the north line of said Field's land, thence easterly on said Field's land to the first-mentioned bounds." The north-east corner of Field's lot was a well-known and established bound.

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The tenant claimed title as follows: Linus Hubbard conveyed to William W. Bowles by deed dated July 1st, 1836 a lot of land "beginning at the south-east corner, at land of Cyrus Buckland, thence north on Pine street five rods and twelve feet to a stake and stones, thence westerly on my own land five rods and ten feet to a stake and stones, thence southerly on my own land four rods to land of said Buckland, thence easterly on land of said Buckland five rods and five feet to the place of beginning." Bowles, by deed of June 7th, 1838, conveyed to Draper and Bailey; and Bailey, on the 24th of September, 1847, made a quitclaim deed to the tenant.

The following facts appeared in evidence. At or soon after the time of Hubbard's conveyance to Buckland, Hubbard and Buckland together measured Buckland's line on Pine street, beginning at a point which Hubbard said was the corner of the Stephenson lot, and measuring thence northerly on Pine street fifty-nine feet; and very soon afterwards a post and rail fence was erected by Hubbard and Buckland according to this measurement between Buckland's lot and Hubbard's lot on the north, and between Buckland's lot and that of William Bradley (who had married Eunice Stephenson) on the south. Buckland occupied to these fences, until he sold to Cleaveland the premises in dispute, making part of his garden. The demandant, soon after his purchase from Buckland, under an arrangement with Bailey, removed the fence between their lots, and occupied a part of Bailey's lot adjoining his own northerly line; and when this arrangement was at an end, in October, 1846, built a new picket fence substantially on the line of the one which he had removed. The end of this fence on Pine street was one hundred and sixty-two feet and ten inches northerly of the Field corner; and in the fall of 1847, was removed by the tenant southerly upon the demandant's land.

In 1838 or 1839, Bradley built a picket fence in front of his lot on the line of Pine street, which he directed to have made one hundred feet long, but through a mistake of the workmen, in measuring, it was extended one hundred and

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four feet northerly from Field's corner. The demandant, after his purchase of Buckland, notified Bradley that the fence between their lots was four feet too far north on Pine street, and it being found on measurement to be one hundred and four feet north of the Field corner, he, with Bradley's consent, cut off four feet of the northerly end of the picket fence on Bradley's front line, and removed the fence between their lots four feet southwardly, and had ever since occupied to that fence, as so removed.

Upon these facts, the court ruled, that the description in the deed from Bailey to Flagg of a boundary line on Cleaveland's land, was to a line to which Cleaveland owned, and not land of which Cleaveland was in possession merely; the line of ownership, and not of occupation, governing, where ownership of adjoining land was shown to exist. Upon the question whether the tenant could set up in defence the various deeds relied upon, and show that Bailey, his grantor, had a right to the estate demanded, notwithstanding the tenant received his deed at a time when the demandant was in adverse possession of the premises, the court ruled, that assuming the general doctrine to be, that the tenant could not by the deed from Bailey obtain a valid title in his own right, sufficient to support a writ of entry, yet that if the demandant admitted himself to be disseized, and the tenant had actually entered under his deed and acquired possession, he could not, in an action brought by himself to regain possession, avail himself of this objection, so far as to prevent the tenant from setting up the legal title as having existed in Hubbard, and by him transmitted through Bailey to the tenant, in reference to the demandant's right to recover the land.

The jury were further instructed, that the location of a fence between the lands of the respective parties could not control or give a construction to a deed, where the language of the deed on the face of it was clear and obvious, especially if the jury believed that the fence was so located by the parties under a mistake, and that no title had been acquired by adverse possession; but that in cases of doubtful words

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in a deed, or where the description of the premises was uncertain on the face of it, the acts of the parties, and their practical construction, might be shown, and were evidence to be considered by the jury in giving a construction to the deed.

The jury returned a verdict for the tenant. If the rulings and instructions above stated were not sufficiently favorable to the demandant, a new trial is to be ordered; otherwise, judgment is to be rendered upon the verdict.

R. A. Chapman, for the demandant, cited *Boston & Worcester Railroad Corp.* v. *Sparhawk*, 5 Met. 469; *Everenden* v. *Beaumont*, 7 Mass. 76; *Swett* v. *Poor*, 11 Mass. 549; *Brinley* v. *Whiting*, 5 Pick. 368; *Lane* v. *Shears*, 1 Wend. 433; *Stone* v. *Clark*, 1 Met. 378; *Crosby* v. *Parker*, 4 Mass. 110.

H. Morris, for the tenant, cited *Crosby* v. *Parker*, 4 Mass. 110; *Cornell* v. *Jackson*, 9 Met. 150; *Wade* v. *Lindsey*, 6 Met. 407; *Sparhawk* v. *Bullard*, 1 Met. 95, 103.

Shaw, C. J. The demandant contends, that, independ ently of any question of possession or disseizin, the deed from Hubbard to Bowles, of July 1st, 1836, under which the tenant claims, did not by its description purport to carry his south line, to which the demandant removed his fence and now claims, so as to include the triangular strip now in controversy. This question depends upon the construction of that deed and its descriptive terms.

It appears that about two years before, namely, on the 18th of February, 1834, Hubbard had conveyed to Buckland a lot on Pine street, the boundary of which could be exactly determined by admeasurement from Field's corner, which was a well-known fixed point, on Pine street. But in consequence of some mistake in the admeasurement, the point supposed and understood both by the grantor and the grantee to be the northerly bound of the land thus granted, was fixed between four and five feet too far north, and a fence had been erected, by the mutual consent of Hubbard and Buckland, on the line thus erroneously fixed, at its easterly end, on Pine street.

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Such was the state of Buckland's title under Hubbard and such the position of the fence, when the deed in question was made, from Hubbard to Bowles, July 1st, 1836, in which the estate is described as follows: "Beginning at the south-east corner, at land of Cyrus Buckland, thence north on Pine street five rods twelve feet to a stake; thence westerly on my own land five rods ten feet to a stake; thence south on my own land four rods, to land of said Buckland, five rods and five feet to the place of beginning." The question is, whether the south-east corner at land of Buckland shall be construed to be the true line of Buckland's land, or the fence which was set up by consent of both Buckland and Hubbard, under a belief, that it was the true line, and which was in fact the line of Buckland's occupation; and the court are of opinion, that it was the true line of Buckland's land, and not the line of his occupation, as indicated by a fence placed there by mistake, which was intended. The fence had not stood long enough, if it amounted to a disseizin, to give Buckland any title or claim of right by possession; and the true line was capable of being precisely ascertained, by admeasurement from Field's corner. *Crosby* v. *Parker*, 4 Mass. 110; *Cornell* v. *Jackson*, 9 Met. 150.

When a monument is mentioned in a deed, and there is no such monument on the ground, and the parties by consent, at the time or soon after, erect and place a monument, intending it as and for the monument described, it will be so deemed afterwards, as if it had been standing at the time. *Makepeace* v. *Bancroft*, 12 Mass. 469; *Blaney* v. *Rice*, 20 Pick. 62. But that rule does not apply to the present case. Here no fence was alluded to in the deed, as a monument. The fence was not set up with a view to make it a monument, and there was no uncertainty respecting the true line. It appears quite certain, then, that Hubbard owned up to Buckland's true line, notwithstanding the fence; and if he did, we think it is beyond doubt that he intended to convey it; indeed, such is the direct effect of the words of his deed to Bowles.

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Another point, relied upon by the demandant, was, that the tenant's predecessor, Bowles, took his deed from Hubbard, when Hubbard was himself disseized; that nothing passed by the deed; that the defendant took no title under Bowles's deed; and that he could not defend in this action. But, although Hubbard was disseized, when he conveyed to Bowles, and perhaps Bowles did not thereby become seized, it would not necessarily follow that Bowles would be wholly a stranger to the title. If he had no right of entry, yet he might have brought an action in the name of his grantor, and, upon recovery, held the land to his own use. But he did in fact enter, and remove the fence, and placed it on the true line, and remained in possession. Now, the demandant brings an action, which puts the title directly in issue; and, by way of rebutter, and to avoid circuity of action, the court are of opinion, upon the authorities, that the tenant may avail himself of his title, in defence to the present action. *Wade* v. *Lindsey*, 6 Met. 407.

Judgment on the verdict for the tenant.

BENJAMIN F. JOSEPH *vs.* GERSHOM M. BIGELOW.

The date of a contract in writing, when referred to in the body of the contract as fixing the time of payment, cannot be altered or varied by parol evidence.

THIS was an action of assumpsit upon a memorandum in writing, signed by the defendant, of which the following is a copy:—

"CABOTVILLE, Nov. 10, 1846. Due to Benjamin F. Joseph or order forty-five dollars worth of No. 1 soap at six cents per lb.; thirty-five dollars worth of patent white soap at four cents per lb.; and twenty dollars worth of soap at three dollars and fifty cents per barrel; in sixty days from date."

Demand was made and suit brought on the 13th day of January, 1847.

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At the trial, in the court of common pleas, the defendant offered evidence tending to prove the following facts: That the contract was made on the 10th of December, 1846, and was intended to be dated of that day, but was written November 10th, by the mistake of a third person, who drew up the memorandum, and that it was signed and delivered without discovery of the mistake by either party; that Joseph, afterwards, while in possession of the note, and before the 10th of January, 1847, discovered and admitted the mistake, but it was never corrected; that the defendant was a soap manufacturer; and that sixty days were requisite for the manufacture of soap, in the ordinary prosecution of the defendant's business.

The defendant contended, upon this evidence, that there was no breach of the contract by a failure to deliver the articles on the 13th day of January; but that he was entitled to sixty days from the time of executing the memorandum.

The plaintiff objected to the admission of this evidence as varying a written contract by parol evidence, and denied its effect as insisted upon by the defendant. But the court ruled that the evidence was admissible, and that the defendant was entitled to sixty days from the time of executing the memorandum, if the jury should find the facts to be as the defendant alleged.

A verdict was thereupon rendered for the defendant, and the plaintiff excepted.

It was afterwards agreed to submit the case to this court upon the foregoing facts, as upon an agreed statement.

W. G. Bates, for the plaintiff.

J. Wells, for the defendant, cited 1 Dane, Ab. 437, 536, 540; *Jackson* v. *Schoonmaker*, 2 Johns. 230; *Lee* v. *Mass. F. & M. Ins. Co.* 6 Mass. 208; 1 Swift, Dig. 178; 2 Bl. Com. 304; Com. Dig. Fait, 3; 2 Gr. Ev. § 12; 2 Hilliard, Ab. 298; Steph. N. P. 781; 1 Gr. Ev. § 324; Story, Prom. Notes, § 48; *Hall* v. *Cazenove*, 4 East, 477; *Brutt* v. *Picard*, Ry. & Mo. 37; *Jacobs* v. *Hart*, 2 Stark. R. 45; *Bowers* v. *Jewell*, 2 N. H. 543; 2 Chit. Pl. 31, 117, 158; Chit. Bills, [530,] 501, in some copies, 455; Chit. Con. 730, a.

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Joseph v. Bigelow.

SHAW, C. J. It is now too well settled to admit of doubt, that when the terms of a written contract are clearly expressed, a party against whom a suit is brought upon such contract cannot prove a mistake of one of its essential terms, and defend upon the ground, that if written in the terms in which the parol evidence tends to prove it ought to have been, the plaintiff could not recover. If it may be thus altered in one of its important terms, it may be in others. If the time of payment may be altered, then may also the number of dollars to be paid; the rate at which specific articles are to be delivered in payment; that it should have been "with grace," and that so the action was brought too soon; that it was not intended to be "to order;" and thus it may be altered in every particular.

The general rule seems to be admitted; but it is argued that this case is not within it, because the mistake is in the date, which is not an essential part of the contract, but is something superadded, and the true date may be shown by evidence *aliunde*. We suppose the date is not a substantial part of the contract, or conclusive proof of the time when it was made or delivered; but when necessary, the true time of making may be shown, as a fact, by any competent evidence, as in the case of the date and delivery of a deed.

But though the date of a note may be considered as something superadded, and as evidence of the time of the execution of the contract not conclusive, yet when referred to, in the body of the contract, as fixing the time of payment, it becomes a part of the note, as if expressed in words, and as incapable of being altered or varied by parol evidence, as any other part of the written contract. It has the same effect as if it were stated in the note that it was payable on the "9th day of January next," or more literally and exactly, payable "in sixty days from the 10th of November, 1846." It thus becomes a part of the body of the note; and we think parol evidence was not admissible to alter it.

Judgment for the plaintiff.

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ARTHUR N. BEAN *vs.* ANDREW HUBBARD & another.

Trespass lies against an officer for taking goods exempt by law from attachment.

In an action against an officer for attaching goods exempt by law from attachment, evidence that the owner had included them in a mortgage, made without consideration, and with the intention of putting his property out of the reach of creditors, is immaterial.

Where evidence is rightly rejected, though for an insufficient reason, no exception lies.

THIS was an action of trespass to recover damages for taking goods of the plaintiff, and was tried before *Mellen*, J., in the court of common pleas.

On the trial, the plaintiff proved the taking of the property by both the defendants, and introduced evidence tending to show, that the goods were exempt from attachment, as necessary articles of household furniture. The defendants offered in evidence a writ against the plaintiff in favor of the defendant Hubbard, and proved that Beaman, the other defendant, was a constable, and authorized to serve the writ. And they objected to the form of action, contending that if the property was exempt from attachment, the plaintiff's remedy was by action on the case; but the court overruled the objection.

The defendants then called as a witness Otis A. Seamans, esquire, a counsellor and attorney of this court, who stated, on his examination, that in January, 1845, the plaintiff came to his office and employed him to draw a mortgage of personal property, including certain articles of household furniture, and in connection with this, asked his advice, and made certain statements, and that he understood that these statements were made to him as counsel, and that he had no right to testify to them. The plaintiff thereupon objected to his testifying further. The defendants' counsel then stated, that if the witness could be permitted to testify, his testimony would be as follows: That the plaintiff inquired of him what property was attachable, whereupon he referred to the statute, and read it to the plaintiff; that the plaintiff then directed him to put into the mortgage the property mentioned in the plaintiff's writ; that he then asked the plaintiff what

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the condition of the mortgage was to be, and was told to make it $80; that, after the mortgage was made and a note written, the plaintiff, as he was going out, turned and said, that he did not owe the mortgagee the money, but that it was to cover the property, and soon after added, "I guess I'm soon enough for them now. If they get the start of me, they will have to get up early." And the defendant offered to prove these statements by the witness. But the court excluded the evidence on the ground that it was a privileged communication.

The jury, under instructions which were not excepted to, found a verdict for the plaintiff, and the defendants then excepted to the foregoing rulings of the court.

W. G. Bates, for the defendants, to the point that the action should have been case, and not trespass, cited *Tarlton* v. *Fisher*, 2 Doug. 671; *Chase* v. *Fish*, 4 Shep. 132; *Carle* v. *Delesdernier*, 1 Shep. 363; *Foss* v. *Stewart*, 2 Shep. 312; *Donahoe* v. *Shed*, 8 Met. 326; *Wilmarth* v. *Burt*, 7 Met. 257; *Horton* v. *Hendershot*, 1 Hill, 118; *People* v. *Warren*, 5 Hill, 440; *State* v. *Morgan*, 3 Ired. 186.

R. A. Chapman, for the plaintiff, as to the form of action, cited *Six Carpenters' Case*, 8 Co. 146; *Oystead* v. *Shed*, 12 Mass. 536; *Gibson* v. *Jenney*, 15 Mass. 205; *Howard* v. *Williams*, 2 Pick. 80; *Brown* v. *Wait*, 19 Pick. 470; *Buckingham* v. *Billings*, 13 Mass. 82; *Malcom* v. *Spoor*, 12 Met. 279; *Kaley* v. *Shed*, 10 Met. 317; *Holly* v. *Huggeford*, 8 Pick. 73; *Kittridge* v. *Sumner*, 11 Pick. 50; *Daily* v. *May*, 5 Mass. 313; *Glidden* v. *Smith*, 15 Mass. 170; *Briggs* v. *Strange*, 17 Mass. 405.

Shaw, C. J. Supposing the goods in question were exempted from attachment, the defendant contends, that trespass *de bonis asportatis* against the officer is not the proper form of action. No case directly in point is cited; those referred to are cases of arrest, which are not strictly analogous. But in regard to property, if an officer cannot justify his taking under his writ, in general, he is liable to an action of trespass *de bonis asportatis;* as if he takes goods not the property of the defendant; or when his original taking is right,

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but he afterwards abuses his authority, he is a trespasser *ab initio*, and this action lies.

In the specific case of taking goods exempted by law from attachment, the practice has been, ever since the passing of the statute on the subject, to bring trespass. We are not aware that the point has ever been adjudicated, because, we think, it was never contested. *Buckingham* v. *Billings*, 13 Mass. 82; *Gibson* v. *Jenney*, 15 Mass. 205; *Howard* v. *Williams*, 2 Pick. 80; *Brown* v. *Wait*, 19 Pick. 240. In these cases, and probably in many others, trespass *de bonis asportatis*, by the defendant against the officer, for taking goods exempted from attachment, was the form of action, and judgments were rendered in them. This exception, we think, cannot be sustained.

In regard to the other point, the objection to the testimony of Seamans, it seems to be hardly necessary to inquire, very particularly, whether the admissions of the plaintiff, offered to be proved by him, were privileged communications, as between attorney and client, or not; because the evidence, if given, would have been wholly immaterial. If the goods were liable to attachment on that writ, this plaintiff could maintain no action; if they were exempt from attachment for his debts, he did no wrong to creditors by mortgaging them without consideration or otherwise; such a mortgage would not be fraudulent, and could not render goods liable to attachment which were not so otherwise.

The evidence being rightly rejected, though on another ground than that stated, the exceptions cannot be sustained.

Exceptions overruled.

William V. Sessions *vs.* Samuel Moseley.

A chose in action, as the promissory note of a third person, or a security for money, may be the subject of a gift *mortis causa*.

Where one, in apprehension of death, delivers a thing to another, to be given by him to a third, after the death of the donor, and, on such donor's death, the thing is delivered accordingly to the donee designated, and accepted by him, this is a valid gift *mortis causa*. But where one, not in apprehension of death,

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delivers a thing to another, to be given to a third, when the depositary shall see him, whether the donor live or die, the authority of the depositary to deliver the thing will be revoked by the death of the donor, unless it be previously delivered to the donee and accepted by him.

THIS was an action brought by Danford Work, in the name of the plaintiff, as the administrator of Festus Work, to recover the amount due on a promissory note for $955, made by the defendant payable to Festus Work or order.

At the trial, which was before *Metcalf*, J., in this court, it was contended on the part of the plaintiff, that the note in question was given to Danford Work in the manner described by Lurancy Work in her deposition. She testified in substance as follows: —

"I am the sister of Festus Work. He died September 18th, 1846, at John Work's house in Wilbraham. John's house was his home, and he had generally boarded there; it was the place where his father lived. Festus had been unwell for a number of years before his death, and not able to do much business; he had worked considerable at times during that time; he did all his own business; before he was sick, he worked hard; he was an economical and prudent man. On or about the 20th day of July, 1846, Festus came to John's house in the afternoon, and staid a few hours. He took out his pocket book, and said he was going to give his notes away. He took some notes out of his pocket book, and gave them to me; one of these was a note against Samuel Moseley of $955, to be delivered to my brother Danford Work the first time I saw him. He gave me a note against Reuben Lazell for $154, one against Edward Bliss for $125, two against Walter Hitchcock, one for $84, and one for $20, and one against John Lincoln for $70. He told me to take the notes against Hitchcock and Lincoln, and five dollars in money which he gave me, and to pay his debts and expenses, and if there was any thing left to give it to Danford. He told me to give the notes against Bliss and Lazell to my sister Mrs. Sikes for her youngest boy Festus Eugene Sikes. I do not know of his having any other notes. He then gave me the pocket book, and I put the notes in it and kept them. He told me to

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give the pocket book to Danford. I put the pocket book away, and had it till I saw Danford. Festus never had the pocket book again. There were some other papers in the pocket book, a receipt or two and a tax bill. I did not consider the papers of any consequence. At the time he gave me the notes, I asked him if he was more unwell than usual. He replied that he should not live long, and desired to have me take the notes and give them to the persons named. He told me to give the notes to Mrs. Sikes the first time I saw her. I did not know before this time that he was more unwell than usual. About the middle of August he called in at John's house with a new pair of shoes, and staid over three hours. On or about the 20th day of August, 1846, he was brought to the house of John Work, and was then very sick and beyond recovery. He had watchers every night. At the time he was brought home, he said that he did not expect to get well, and spoke of his flesh wasting away on his hands. There was hardly a day after his being brought home but he said he should live but a short time. About the end of August, Mrs. Sikes came to see him, and I gave her the notes against Bliss and Lazell in his presence. He told her to see that she kept the notes for her son. I don't remember that he said any thing more, then, or at any other time during his sickness, about these or any other notes. He did not sit up any of consequence after he was brought home, but did some for a few minutes at a time. I paid his funeral charges and doctor's bill and the expenses of his sickness, not more than $30 in all; and a debt of $30 or $35 to Hitchcock. I wrote to Danford when my brother Festus died; he did not come to the funeral; I had an answer in a few days. I wrote to him in a few days again. I wrote to him often. I first saw Danford in July, 1847, and then gave him the note against Moseley."

The note in question was not delivered to Danford and accepted by him until July, 1847. Letters of administration were granted to the plaintiff on the 6th day of April, 1847, and on the 17th of April he demanded the note of Lurancy Work, it being then in her hands. The administrator, who

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had discharged the note, and who carried on the defence to this suit, contended that the note was his property, and filed a motion for the dismissal of this suit. The defendant also insisted, that if the evidence tended to show a gift by the intestate, it was a gift *inter vivos*, and was not valid unless accepted by Danford Work in the lifetime of the intestate, and that the acceptance in July, 1847, after the appointment of the plaintiff as administrator, was not sufficient to make a valid and legal gift.

But the court instructed the jury, that if they believed that Festus Work, being sick and apprehensive that he should not recover, gave into the hands of Lurancy Work the note in suit, with instructions to give it after his death to Danford Work, and if Lurancy kept the note in her hands until after the death of Festus, and gave it to Danford after Festus's death, and Danford accepted it, the plaintiff was entitled to recover; and that the burden of proof was on the plaintiff to satisfy them that such a gift was made and accepted; or, if they believed that Festus gave the note in suit to Lurancy without any apprehension of death, directing her to give it to Danford when she should see him, and meant to make a gift of it to Danford whether he (Festus) should live or die, and Lurancy gave the note to Danford, and he accepted it, that then the plaintiff was entitled to recover, although the acceptance was not till July, 1847.

The jury found a verdict for the plaintiff, and the defendant alleged exceptions.

L. Norton, for the defendant.

The gift should have been made during the donor's last sickness, or in apprehension of death. 2 Bl. Com. 514; *Tate* v. *Hilbert*, 2 Ves. Jr. 111, 119; 8 Com. Dig. *Donatio Mortis Causa*, 527; *Blount* v. *Burrow*, 1 Ves. Jr. 546; *Raymond* v. *Sellick*, 10 Conn. 480; *Grover* v. *Grover*, 24 Pick. 261. And it should have been accepted by the donee. 1 Bouv. Law Dict. 343; 2 Kent, 438; 4 Dane, Ab. 123; *Noble* v. *Smith*, 2 Johns. 52; *Pearson* v. *Pearson*, 7 Johns. 25; *Granziar* v. *Arden*, 10 Johns. 293; *Bowers* v. *Heard*, 10 Mass. 427; *Parish* v *Stone*, 14 Pick. 198; *Bryson* v. *Brownrigg*, 9 Ves. 1; *Ward* v

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Turner, 2 Ves. Sen. 431, 444; Chit. Cont. 14. Placing the note in the hands of a third person is not enough. The direction to Lurancy to make the delivery, when she should see the intended donee, was a power which was revoked by the death of Festus.

H. Morris, for the plaintiff.

Delivery to a third person is sufficient. *Drury* v. *Smith*, 1 P. Wms. 404; *Borneman* v. *Sidlinger*, 6 Shep. 225; *Wells* v. *Tucker*, 3 Binn. 366; *Wheelwright* v. *Wheelwright*, 2 Mass. 447; *Hatch* v. *Hatch*, 9 Mass. 307; *Hedge* v. *Drew*, 12 Pick. 141; *Foster* v. *Mansfield*, 3 Met. 412; *Richardson* v. *Lincoln*, 5 Met. 201. The gift being beneficial, an acceptance will be presumed. *Stebbins* v. *Lathrop*, 4 Pick. 33.

Shaw, C. J. This action is brought in the name of the administrator of Festus Work, upon a promissory note made by the defendant, payable to the intestate. The suit is brought by Danford Work, a brother of the intestate, and the only question is, whether Danford is entitled to recover the amount, and hold it to his own use, upon the ground of a gift from the intestate to him. This note was placed, with others, in the hands of a sister of the intestate, by him, during his last sickness, with directions to her to deliver the notes as set forth in her deposition.

The question is, whether, under the circumstances, the transaction, as stated by the sister, constituted a valid gift of Moseley's note by the intestate, either as a gift *inter vivos*, or as a good *donatio causa mortis*. The inquiry before us relates to the correctness of the instructions given by the court to the jury. The judge instructed the jury, that if Festus Work, being sick and apprehensive of death, gave into the hands of Lurancy the note in suit, with directions to give it, after his death, to Danford Work for his own, and she kept the note till after the death of Festus, and then gave it to Danford, and he accepted it, the plaintiff was entitled to recover.

This, we think, was correct. Here are all the requisites for a good *donatio mortis causa*. A note of hand of a third person, a security for money, or a chose in action, however it may have been formerly considered, is now held to be a

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proper subject of such a gift. There was an actual delivery to a person for the use of the donee; an expectation of death; the death of the donor ensuing; a subsequent delivery to the donee; and an acceptance of the gift by him. *Parish* v. *Stone*, 14 Pick. 198.

The court further instructed the jury, that if they believed that Festus gave the note to Lurancy without any apprehension of death, directing her to give it to Danford, when she should see him, and meant to make a gift of it to Danford, whether he should live or die, and Lurancy gave the note to Danford, and he accepted it, then the plaintiff was entitled to recover.

The court are of opinion, that this instruction cannot be supported. It regards the transaction as a gift *inter vivos*, though not assented to by the donee, or even known to him and not delivered to him till after the donor's death.

The difference between a gift *inter vivos* and a gift *causa mortis* is this: the former is absolute, irrevocable, and complete, whether the donor die or not; the subject of it must therefore be delivered to the donee or to some other person, with his consent, for his use, and must be accepted by him. *Grover* v. *Grover*, 24 Pick. 261. If, therefore, it be delivered to a third person, with authority to deliver it to the donee, this depositary, until the authority is executed by an actual delivery to and acceptance by the donee, is the agent of the donor, who may revoke the authority and take back the gift; and, therefore, if the delivery do not take place in the donor's lifetime, the authority is revoked by his death; the property does not pass, but remains in the donor, and goes to his executor or administrator. But if intended as a gift *causa mortis*, it could not become absolute and irrevocable till the death of the donor; and, therefore, if delivered to and accepted by the donee, after the decease of the donor, it is sufficient; although it must be remembered, that even as a good and valid *donatio causa mortis*, no such gift can avail against creditors. *Tate* v. *Hilbert*, 2 Ves. Jr. 111.

As the jury may have given their verdict under the second instruction, we think the verdict must be set aside, and a new trial granted.

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Weston Cooley & Wife *vs.* David Norton.

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The declarations or admissions of an agent, accompanying acts done by him within the scope of his authority, and during the period of his agency, are admissible in evidence against his principal, as a part of such acts, but not otherwise.

A witness having been asked whether he was not biassed against the defendant, from the defendant's having testified against him in another suit to which the witness was a party, and whether he had not made use of threats of injury against him in that suit, and having denied any such bias or threats, it was held, that evidence that the witness had offered to bribe the defendant not to testify in that suit was irrelevant and inadmissible.

This was a writ of entry on a mortgage, and was tried before *Wells*, C. J., in the court of common pleas.

It appeared on the trial, that the mortgage declared on belonged to the wife before marriage, and evidence was offered by the defendant tending to show that it had since the marriage been paid to the wife. The defendant then offered to prove, that before the marriage a verbal agreement had been made between the plaintiffs, that the mortgage and the note secured thereby should continue to be the property of the wife and under her sole control afterwards; for the purpose of showing a right in the wife to control the mortgage and receive payment of the debt thereby secured, independently of her husband and without his consent. The court ruled that the evidence was incompetent for this purpose, but admitted it under and with reference to an offer, also made by the defendant, to prove that the wife acted as her husband's agent in receiving payment of the mortgage.

The defendant proved certain facts tending to show that the wife was the husband's agent in receiving payment of the mortgage. He also offered to prove declarations and admissions of the wife during the period of the alleged agency, relating to the subject matter of the agency, but not accompanied with acts; but the court rejected the evidence.

The defendant produced the note, and the mortgage declared upon, which were in his possession. Further to explain the possession, he introduced a witness, whose evidence tended to prove, that on a certain occasion, he was

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present with the wife and the defendant, when the wife produced the note and mortgage, and demanded payment of the defendant, and actually, in pursuance of said demand, received from the defendant a sum of money less than the amount of the note, which sum the witness had then and there paid over to the defendant to be thus applied. This evidence was admitted by the court as being to an act of agency. The defendant then offered to show by the same witness, that at the same time, and in the same conversation, it was stated by the wife and by the defendant, that the payment in full of the note was to be immediately completed, and that they (the wife and the defendant) were then going out together for that purpose. This evidence was objected to by the plaintiff, as not being part of the *res gestæ*, and was excluded by the court.

The defendant further offered to show, by the same witness, that in the same conversation, something was said of his (the witness's) having shortly before paid the defendant another sum of money to be applied on the note in the hands of the wife of the plaintiff. This evidence also, being objected to by the plaintiff, was rejected by the court.

The defendant, on cross examination, asked one Allen Wolcott, a witness for the plaintiff, whether he were not biassed against the defendant, from the defendant's having testified against him in another suit to which Wolcott was a party, and whether he had, or had not, made use of threats of injury against the defendant, if he should testify against him in said suit. The defendant then offered to show that in fact said Wolcott had offered to bribe the defendant not to testify in said suit; but the court rejected the evidence, on the ground that no inquiry had been made of the witness upon that point.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

G. T. Davis, for the plaintiff, waived the first exception. as to the second and third exceptions, he referred to 1 Gr. Ev. § 113; Story, Ag. § 134; *Bank of Monroe* v. *Field*, 2 Hill, 445; *Baring* v. *Clark*, 19 Pick. 220; *Biggs* v. *Lawrence*, 3

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T. R. 454; *Lobdell* v. *Baker*, 1 Met. 193, 202: and as to the fifth exception, to 1 Gr. Ev. §§ 450, 462; *Attorney General* v. *Hitchcock*, 1 W. H. & G. 91, 103; *Yewin's Case*, 2 Camp. 638; *Thomas* v. *David*, 7 Car. & P. 350; *Strafford's Case*, 2 St. Tr. 616. [WILDE, J. The State Trials of that period are not very good authority on the law of evidence.] They may be good on points decided against the crown.

R. A. Chapman and *W. G. Bates*, for the defendant, cited *Stiles* v. *Western Railroad Corp.* 8 Met. 44, to the third point; and *Utley* v. *Merrick*, 11 Met. 302, to the fifth point.

FLETCHER, J. The first exception taken was waived by the counsel at the argument.

The rulings of the judge, to which the second, third, and fourth exceptions were taken, are manifestly correct, and in perfect accordance with a very plain, familiar, well-settled, and clearly-defined principle of law. The evidence excluded in each of the above instances was offered to prove the mere sayings of a person alleged to be the plaintiff's agent, wholly disconnected and distinct from any act of agency. It was mere hearsay evidence, and nothing more or better. The rule of law is, that when an agent is acting within the scope of his authority, his declarations accompanying his acts are admissible, as they are a part of the *res gestæ*, and may qualify the acts. The sayings and declarations, offered to be proved in the above instances, were not within this rule, and were clearly not admissible.

And it is impossible to see any ground upon which the evidence offered under the fifth point could have been properly admitted. The alleged attempt to bribe a witness had no reference to the cause then on trial, but to another distinct and different cause of action tried at some former period. The attempt was to show, that at some other time, and in reference to some other cause, the witness had done a criminal thing; no inquiry having been made of him in relation to the matter. Such act, if proved, would not be regarded as contradicting the positive testimony of the witness denying any bias or threats against the defendant.

Exceptions overruled.

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THOMAS DIXON & another *vs.* EDMUND HANCOCK & others.

A party residing abroad, having contracted with a manufacturer in this state for the building of certain machines, which were to be delivered to such party's general agent here, by whom they were to be received and shipped, and paid for out of funds furnished him for the purpose, a part of the machinery was accordingly manufactured and delivered to the agent, and the whole thereupon paid for by him; it was held, that the agent did not thereby acquire any such property in the articles not delivered, as would entitle him to maintain an action of replevin therefor against the manufacturer.

THIS was an action of replevin, and was submitted to the court upon the following facts:—

In November, 1846, William E. Clarke, on behalf of Henry G. Cussen, of the firm of Hartley and company, of Rio Janeiro, made a contract with the defendants at Jencksville, in the town of Ludlow and county of Hampden, for certain machinery, namely, fifty looms, two Taunton speeders, and a drawing frame, to be delivered in Boston to the plaintiffs, who were to receive and ship the same to Hartley and company. In the latter part of April, 1847, the looms were delivered to the plaintiffs at Boston; and the defendants wishing to settle for all the machinery then, and promising that the speeders and drawing frame should be delivered in the course of the next week, Clarke made a draft on the plaintiffs, who were also the general agents of Hartley and company, for the full amount of the machinery, and the plaintiffs accepted the draft, and paid it out of funds deposited by Cussen with them for the purpose. The speeders and drawing frame not being delivered at the time agreed on, this action was brought.

H. Vose, for the plaintiffs, cited Chit. Cont. 300; *Rohde* v. *Thwaites*, 6 B. & C. 388; *Tuxworth* v. *Moore*, 9 Pick. 347; Story, Ag. §§ 361, 371; *Baker* v. *Fuller*, 21 Pick. 319; *Eaton* v. *Lynde*, 15 Mass. 242; *Baker* v. *Fales*, 16 Mass. 147; Rev. Sts. *c.* 113, § 27; *Badger* v. *Phinney*, 15 Mass. 359.

L. Norton, for the defendants, cited *Waterman* v. *Robinson*, 5 Mass. 303; *Wheeler* v. *Train*, 3 Pick. 255; *Whitwell* v. *Wells*, 24 Pick. 25; *Pattison* v. *Adams*, 7 Hill, 126; *Perley* v.

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Foster, 9 Mass. 112; *Warren* v. *Leland*, 9 Mass. 265; *Lawrence* v. *Wright*, 23 Pick. 128; *Ludden* v. *Leavitt*, 9 Mass. 104; *Coxe* v. *Harden*, 4 East, 211; *Waring* v. *Cox*, 1 Camp. 369; *Phelps* v. *Willard*, 16 Pick. 29; *Atkinson* v. *Bell*, 8 B. & C. 277; Story, Ag. §§ 28, 29, 150, 151; *Gilmore* v. *Pope*, 5 Mass. 491; *Gates* v. *Gates*, 15 Mass. 310.

By the court. This is merely a question of fact on the evidence. It is replevin for certain machines described. They were made for Hartley and company, of Rio Janeiro. Cussen, as their agent, contracted with Clarke, and he made a subcontract with the defendants, Hancock and son, by whom the machines were made. Dixon and son, the plaintiffs, merchants in Boston, were the agents, by whom the machines were to be received and shipped to Hartley and company; they were also by agreement to advance and pay the money for them, when received to be shipped. The court are of opinion, that Dixon and son, the plaintiffs, had no property, general or special, in the machines, and therefore cannot maintain replevin for them. They were to pay for them, it is true; but they were to pay as agents, charging the moneys thus paid to their principals.

Judgment for the defendants.

Charles Shaw & others *vs.* Royal E. Blair.

Where, in an action of trespass against three defendants, in which the defendants pleaded the general issue, one of them severally and the others jointly, the jury returned a verdict that "the defendant is guilty," and judgment was rendered thereon against the defendant who pleaded severally, without taking any notice of the others; it was held, that the defendant against whom the judgment was rendered was alone entitled to reverse the same by error, and that a writ of error in favor of the three was improvidently issued, and must be quashed.

Shaw, C. J. This is a writ of error sued out by Charles Shaw, Royal Shaw and Elbridge G. Rich against Royal E. Blair, to reverse a judgment of the court of common pleas.

The original action was trespass *quare clausum*, by the defendant in error, against the three plaintiffs in error

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Charles Shaw pleaded severally, not guilty, and gave notice, that he should insist on a right of possession, in defence. The two other original defendants joined in a plea of not guilty, and gave notice that they should rely on the right of Charles Shaw, having done the acts as his servants and agents, and by his direction, in defence. Upon these pleas issues were joined, and a trial had. It appears by the record, that the jury returned a verdict, that the "defendant is guilty," and assessed damages at the sum of $3·33. No notice is taken in the record of the two other defendants, but judgment is rendered against Charles Shaw for $3·33 damages, and costs exceeding $300.

Before looking at the error assigned, and deciding upon it, there is a preliminary question to be decided, namely, whether this writ is rightly sued out by the three plaintiffs in error. Whether the verdict was intended to be returned, as contended, against all the defendants, or the party defendant, we cannot now know; if it had been so intended, and the judgment had followed it, there would have been no error. But the judgment was in fact rendered against Charles Shaw only.

The general rule is, that a writ of error must be sued out by those who were parties or privies to the judgment complained of, and which is sought to be reversed, and by no others. The general rule is laid down in Bac. Ab. Tit. Error, B.; 2 Wms. Saund. 46, note 6; 101, *e; Parker* v. *Lawrence*, Hob. 70; *Vaughan* v. *Lorimer*, Cro. Jac. 138; *Jaqueth* v. *Jackson*, 17 Wend. 434. No one can maintain a writ of error to reverse a judgment but he who is aggrieved by it. The writ alleges error to the great damage of the plaintiff. *Alling* v. *Shelton*, 16 Conn. 436; Co. Lit. 288. The fact that the original action is against three is not sufficient to authorize the three to join, if judgment was not rendered against them all. Where three were sued in trespass, and one was acquitted, and judgment rendered against the other two, it was held, that they could bring error, and that the one acquitted ought not to be joined. *Cannon* v. *Abbot*, 1 Lev. 210 There being no judgment against the three plaintiffs in error

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we think the suit cannot be maintained. And where a writ of error is brought by parties not entitled to it, the practice is to quash the writ. *Rex* v. *All Saints*, 2 Stra. 1110; Tidd's Pr. (8th ed.) 1189.

Writ of error quashed.

R. A. Chapman and *H. Vose*, for the plaintiffs in error.

H. Morris, for the defendant in error.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE AGAWAM BANK *vs.* GEORGE B. MORRIS.

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166 381
166 386
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Two partners having given a promissory note on partnership account, signed with their individual names, to a person to whom the existence of the partnership was known, who indorsed and transferred the note, without informing the indorsee of the partnership, one of the partners afterwards went into insolvency, but without any property of the firm being assigned to his assignee; it was held, upon proof of the partnership, that the note was a partnership note, provable as such against the insolvent by the indorsee, who would be entitled to a dividend thereon out of any surplus remaining after paying the separate debts of the insolvent.

A partnership note having been indorsed by the payee to a third person, and by him indorsed to and discounted at a bank of which he was president, and one of the promisors having afterwards become insolvent, the bank proved the note as a claim against his estate: The solvent promisor, afterwards, at the request of the second indorser, and for the purpose of securing him and the bank, but without the knowledge of the bank, gave him security applicable to the note in question, and also to another note held by the bank, such indorser promising to account to the promisor for the surplus of the security, if any: It was held, that the security was not given to the bank, but was a personal one to the second indorsee, and to indemnify him as such; and that a subsequent order of the commissioner, on the motion of the assignee, directing the note to be struck out of the list of claims proved, and disallowing the same, on the ground, that the bank held collateral security therefor, which had not been surrendered or applied, was erroneous.

THIS was a petition addressed to the court under their jurisdiction in matters of insolvency, in which the petitioners prayed for a mandamus to the defendant, as commissioner of insolvency for the county of Hampden.

The following facts were set forth in the petition: —

That on the 6th day of February, 1849, a warrant was duly issued by the commissioner against Veranus Chapin, on the petition of John S. Leonard, one of his creditors, and his estate was, on the 19th of February, assigned to an

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assignee; that the plaintiffs proved before the commissioner certain notes, signed by Veranus Chapin and John S. Leonard, payable to the order of Stephen C. Bemis, at the Agawam Bank, and indorsed by said Bemis and by Chester W Chapin; that the commissioner, on motion of the assignee, decided, upon certain evidence produced before him, that the notes were partnership notes of Veranus Chapin and John S. Leonard, and that the plaintiffs should not be allowed to have a dividend declared upon them till the separate claims proved against Chapin's estate should have been paid; that the commissioner, at a subsequent time, on motion of the assignee, ordered that these notes should be stricken from the list of proved debts and disallowed, on the ground that the plaintiffs held collateral security for the payment of the same, which had not been released and delivered up to the assignee.

The petition concluded in these terms: "And the plaintiffs, feeling aggrieved by the said order of said commissioner, appeal therefrom to this court, and pray that this court will take cognizance of this cause, and that they will issue a mandamus to said commissioner, commanding him to admit said claim to a dividend, and will grant such other relief in the premises as to justice and equity shall appertain."

The testimony introduced before the commissioner was as follows:—

Veranus Chapin, the insolvent, having previously received a valid discharge from his creditors, testified, that at the time the notes in question were given, he was in partnership with Leonard in the buying and selling of coal; that there were no articles of partnership, but that handbills were posted up in the name of Chapin & Leonard; that said notes were given in payment for coal purchased of Stephen C. Bemis, the payee; that but one other note had been given by them previously on partnership account, which was for $100, the price of hay scales, which note was worded and signed in the same manner, and made payable at the Agawam Bank that both he and Leonard were present at the purchase, and told Bemis that they were going into the

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business of buying and selling coal in company; that the business was managed and the books kept by Leonard; that said notes were filled up by Bemis, and signed by witness and Leonard; and that nothing was said about the mode of signing, but that Bemis requested they might be made payable at the Agawam Bank; that it was understood by Chapin & Leonard that the proceeds of sales of coal were to be deposited in the bank to pay the notes; and that there had been no settlement of the partnership business between them.

Stephen C. Bemis testified, that he sold the coal to Chapin & Leonard, and supposed them to be in company in some way, as they were both together when it was bought; that he sold the coal to them for cash, but told them if they would give a note or notes he would give them a credit; that afterwards, when the notes were given, he made them out payable at the bank, and they signed them, but nothing was said as to the manner of signing; that the coal was charged on his books, which he produced, to "Chapin & Leonard;" the first charge being September 21st, 1848, the second charge November 11th, and the third charge (for interest) December 4th, the date of the notes; that his reliance was upon Chapin more than on Leonard, and that he knew nothing about their company, what sort of an arrangement they had between themselves, at the time; and that he never, until after the discount of the notes, informed any officer of the bank of their being partnership notes.

He also testified, that at the time of the receipt given to Chester W. Chapin, hereinafter mentioned, Leonard owed him about $150, to secure which Chapin held an assignment from him of his dividend upon a claim of $371·32, which he had proved against the estate of the insolvent, together with a pledge of said hay scales above mentioned, worth about $50; and that the dividend ordered upon the claim of $371·32, on the 3d day of September, was $185·66. No partnership property of Chapin & Leonard was assigned to the assignee of Chapin.

Chester W. Chapin testified, that he was the president of

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the Agawam Bank, and the indorser of the notes in question; that the bank did not, to his knowledge, hold any collateral security for the payment of the same; that said notes were indorsed by him before discount: that there was no previous arrangement that he should indorse them, but that he had been in the habit of indorsing for Bemis, more or less, for ten years past, and that as an individual and an indorser, he obtained from Leonard and held certain securities; that after the insolvency of Chapin, he pressed Leonard for security, and subsequently to the proof and allowance of the notes against Chapin's estate, such security was given by Leonard; that it also covered another note held by the bank, besides the notes in question; and that he signed and gave Leonard a receipt for said security in the following form:—

"J. C. Leonard, being indebted to the Agawam Bank in the sum of $1533·46 and interest, and to S. C. Bemis on account for about $150, and whereas said Leonard has deposited with me $1025·46 for the purpose of securing said sum of $1533·46 and interest on the same, I do hereby agree that I will account with said Leonard for so much of the same in my hands as may remain after paying all said debts in full. Springfield, May 30th, 1849."

This witness further testified, that the security was deposited by Leonard for the purpose of making the bank and himself fully secure, his object being to secure himself and the bank. The bank knew nothing of it.

It was admitted by the parties, that the facts stated in the petition were true; that the testimony above set forth was that which was before the commissioner, and which induced his decision; and that each party had been duly notified of the proceedings, appeals, petitions, &c. And it was agreed, that the court might pass such order or decree as justice and equity might require; all matters of form being waived by the parties, and the case to be decided as though regularly before the court, under the provisions of the insolvent law, giving them chancery jurisdiction.

W. G. Bates, for the petitioners.

H. Morris and *G. Walker*, for the respondent.

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SHAW, C. J. This is a petition to the court, under its summary jurisdiction in cases of insolvency, in the nature of an appeal from the decision of the respondent, as the commissioner of insolvency for the county of Hampden, in the matter of the insolvency of Veranus Chapin.

The facts of the case, as set forth in the petition, and in the statement of the testimony before the commissioner, are, by the agreement of the parties in interest, admitted to be true.

The court are of opinion, upon the evidence, that the notes held by the Agawam Bank, signed by Veranus Chapin and John S. Leonard, were partnership notes, and as such constituted a partnership debt of the two promisors to the bank. The proof of these notes, therefore, was rightly admitted in proceedings against the separate estate of Veranus Chapin in insolvency, because, as a partner and joint debtor, he owed them. But it will be the duty of the assignee to keep distinct accounts of the separate debts and separate assets of the insolvent, and the separate assets must first be applied to pay his separate debts, until they are fully discharged; then, if there be any surplus, it will be added to the fund of partnership assets, if any, and applied to the payment of the partnership debts of Chapin & Leonard. *Barclay* v. *Phelps*, 4 Met. 397.

Upon the other point, it is contended, that the collateral security given by Leonard to Chester W. Chapin should first be applied to the payment of these notes, before proving this debt against the estate of Veranus Chapin. It happened, that Chester W. Chapin, who was the second indorser on the notes, was also president of the bank. We are of opinion, upon the evidence, that the security given by Leonard, a co-promisor, to Chester W. Chapin, president of the bank, after the debt against Veranus Chapin had been proved and allowed, was given to him as a personal security, to indemnify him as second indorser, for such sum as he might be held to pay, being the balance which would be due after deducting the dividend received on the estate of Veranus Chapin. This collateral security was not given or intended

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as a security to the bank; was not one of which they could avail themselves; and therefore not one which they were bound to surrender, or apply, before proof of their debt. The order of the commissioner, therefore, striking out the proof of the debt, because the bank had not applied or surrendered that security, was in our opinion erroneous, and must be reversed, and that proof reinstated.

This renders it unnecessary to consider and decide the more general question, whether, after proof of debt, in cases of insolvency, the commissioner has authority, without some order or direction of this court, to revise and reverse his own former decisions, allowing proof, and to decide, upon new facts or new views of the law, that such proof shall be expunged. *Order to the commissioner accordingly.*

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Lucy Robbins *vs.* Martin K. Bates.

If the rule of law, that a trustee to sell cannot himself become the purchaser, be applicable to the case of an administrator, who obtains a license to sell the real estate of his intestate, and becomes the purchaser thereof through the agency of a third person (which the court did not decide), such purchase is not void, but voidable only by creditors, or heirs, or other persons interested, while the estate remains in the hands of such administrator; but, if he sell and convey the same to a *bona fide* purchaser, for a valuable consideration, and without notice, such purchaser will obtain a good title.

In this case, which was argued by *G. Ashmun* and *P. Boise*, for the plaintiff, and by *W. G. Bates*, for the defendant, the material facts appear in the opinion of the court.

Fletcher, J. This is a creditor's bill, brought by the plaintiff as a creditor, in behalf of herself and other creditors, against the defendant, as the administrator of Mary Bates, deceased. Mary Bates died on the 20th of November, 1842, and on the 22d of February, 1843, the defendant was appointed administrator of her estate. In June, 1844, the defendant obtained a license to sell the intestate's real estate, and on the 26th of October, 1844, the defendant, as administrator, sold the real estate which was the subject of this bill

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In November, 1844, which was one year and nine months after his appointment, the defendant represented the estate insolvent. On the 1st of May, 1845, he rendered his second administration account, charging himself with the proceeds of the sale of the real estate. On the 14th of January, 1846, the defendant executed to Gillett, who was the purchaser at the auction, a deed of the land, and on the next day, January 15th, 1846, Gillett executed a deed to the defendant of the same land. On the 7th of October, 1846, the defendant conveyed the land in fee and mortgage to the Congregational Society of Wintonbury to secure a note of $888·63, for borrowed money. On the 1st of November, 1846, the defendant paid the plaintiff her dividend, $998·25, and interest, $6·25, amounting to $1004·50. This bill was filed in August, 1847. The case was set down for hearing on bill, answer and proofs. The oath to the answer was waived.

The prayer of the bill is, that the conveyance of the estate, in pursuance of the sale at auction, under the license, should be set aside as fraudulent, and that the estate should be again sold, and that the defendant should pay to the plaintiff the balance of her claim. It was maintained, on the part of the plaintiff, that it appeared by the evidence, that the defendant conducted improperly in regard to advertising and selling the estate; that the estate was sold for a very inadequate price; and that the defendant was in fact himself the purchaser, through the agency of Gillett; and that for these reasons the sale should be set aside; the last point being really the only one of importance upon the evidence. These propositions were denied and opposed on the part of the defendant.

But the court has not thought it needful to go at all into a consideration of these points. There would be much difficulty in setting aside the sale on these grounds, by reason of the delay on the part of the plaintiff in instituting this suit. This bill was filed nearly three years after the sale, or about a year and seven months after the land was conveyed to the defendant, a lapse of time sufficient to put the plaintiff upon inquiry as to the defendant's interest in the purchase.

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which is the principal matter of complaint, and the principal ground upon which it is maintained that the sale should be set aside. The plaintiff received her dividend about ten months after the title to the estate was conveyed to the defendant, and more than two years after the sale, and some nine months before instituting this suit. In the mean time, the defendant has been in possession, and improvements have been made on the estate. Under such circumstances, it would be difficult for the plaintiff to establish her right to have the sale set aside.

But it is not necessary for the court to express any opinion on this point; because, for another and distinct reason, this bill cannot be sustained. Assuming that an administrator is a trustee, and so within the rule that a trustee to sell cannot himself be a purchaser, and supposing the defendant was himself the purchaser, through the agency of Gillett, still the sale was not void, but voidable only by the creditors, or heirs, or parties interested. The sale being voidable only, the estate passed to the defendant, subject to be defeated while in his hands, by the parties interested; but a *bona fide* purchaser, who should take a conveyance of the estate for a valuable consideration, without notice, would obtain a good title by such conveyance. Now it is set out in the bill, and appears in the case, that before the filing of the bill, the estate had been conveyed in fee and in mortgage; and the mortgagee, who is not made a party to the suit, holds the estate on a *bona fide* purchase for a valuable consideration, and without notice, and his title is a good and valid title, which cannot be taken away from him by setting aside the sale by the administrator, according to the prayer of the bill. The bill therefore must be dismissed.*

* See *Blood* v. *Hayman*, 13 Met. 231; *Somes* v. *Brewer*, 2 Pick. 184; 4 Kent's Comm. 164.

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Mary A. Bates *vs.* Isaac W. Barber.

The question of a witness's reputation for truth and veracity is one of fact to be tried by the jury; and it is not competent for the court to institute or allow a preliminary examination of the impeaching witnesses, as to their knowledge and means of knowledge of the reputation of the witness sought to be impeached, and, thereupon, to receive or reject their testimony, according as the court are satisfied, or not, that the witnesses have the requisite knowledge to enable them to testify to the fact in question.

Where it does not appear, that a witness rejected as incompetent knew or could testify to any thing relevant to the issue on trial, such rejection is not a valid ground of exception.

An impeaching witness may be asked, on cross examination, to state the names of all persons, whom he has heard speak against the reputation of the witness impeached.

Where a witness is called to testify against the reputation of another witness for truth and veracity, he can only be inquired of as to what he has heard, and cannot be asked, "Whether, from the treatment and conduct of the community generally towards the witness sought to be impeached, he knows enough about his general character to say what it is for truth and veracity."

Evidence having been introduced tending to prove a conspiracy between the defendant and one K., to hire a witness to commit perjury on the trial; and that K., who was an inhabitant of another state, had been requested to attend the court as a witness, but was not present; it was held, that the defendant could not, on the cross examination of a witness who had testified that he was a near neighbor of K., and had seen him every day during the week of the trial, inquire whether K. was a member of a church in the place where he lived.

This was an action on the case for slander, which was tried before *Wells*, C. J., in the court of common pleas, and argued in writing in this court, upon exceptions to certain rulings of the court below, by *G. Ashmun*, for the defendant, and *W. G. Bates*, for the plaintiff. The questions presented by the bill of exceptions are sufficiently stated in the opinion of the court.

Fletcher, J. This was an action on the case for slander, originally tried in the court of common pleas, and brought into this court on exceptions. The first exception was not insisted upon at the argument. The second exception was as follows: The defendant called several witnesses, to prove that the character of one Adams, a witness for the plaintiff, was bad for truth and veracity. The court prescribed the following course for the examination of the witnesses, namely: they must first be examined as to their knowledge

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and means of knowledge of the character of the witnesses attempted to be impeached. In this examination, the counsel on both sides might participate. After this preliminary examination, it was for the court to decide whether the witness possessed sufficient knowledge of the character of the witness to be impeached, to render him competent to testify concerning it. Two witnesses were examined and admitted under this rule. The defendant then called one Marjoram to the same point, and the court required the same preliminary examination; which having been made, the judge not being satisfied that the witness had sufficient knowledge to qualify him to testify, he was excluded. The exclusion of this witness forms the ground of the second exception.

There can be no doubt, that the ruling of the court below, as to the preliminary examination to determine the competency of the witnesses, was erroneous. There is no question of competency for the court to settle, in regard to the knowledge of witnesses called to testify to the point of reputation for truth and veracity. The whole examination is before the jury, as to a matter of fact merely. It is not like the case of experts, who are called to give opinions, and whose qualifications to give such opinions must be first examined and decided upon by the court. What is the reputation of a witness for truth and veracity, is a simple question of fact; and there is no more reason for the court to make a preliminary examination as to the knowledge of witnesses called to testify to this fact, than there is for making such examination as to the knowledge of witnesses called to testify to any other fact. All witnesses, competent to testify to any fact in the case, are competent to testify to the fact of reputation for truth; and the inquiry as to the amount and means of this knowledge is for the jury, in order to enable them to satisfy themselves as to the weight and importance of the testimony.

But though the ruling of the court, as to the preliminary examination, was erroneous, there is no sufficient ground to sustain the exception; for the reason, that it does not appear that the witness who was excluded knew any thing, or

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would say any thing whatever, in regard to the character for truth of the witness intended to be impeached. It not appearing that the party can have been at all prejudiced by the exclusion of this witness, no sufficient case is made in that respect for disturbing the verdict.

In the cross examination of impeaching witnesses, the plaintiff's counsel were permitted to require the witnesses to state the names of all the persons whom they had heard speak against the impeached witness's character. To this the defendant excepts, and this forms the third exception.

Upon this point, there is a difference of opinion among the members of this court; but in the opinion of a majority, the inquiry, upon a cross examination, as to the names of persons who had spoken against the character of the witness impeached, was well warranted by principle, by the course of practice, and by the authorities. According to the impression and recollection of a majority of the court, it has been common in the course of practice to make such inquiry upon cross examination. In point of principle, it would seem proper to make this inquiry, because the witness is called on to state what is the reputation of the person impeached; what is his character for truth by report; what is said as to his character for truth; and it may be very material and important to know from whom in particular the reports come, and what persons they were who spoke against the character of the person impeached. Upon such inquiry, it may appear that all the persons, from whom the witness has heard any thing against the person impeached, are his personal enemies, and so situated in regard to him, that their speech and reports against him are entitled to no consideration whatever. The inquiry may also be proper, in order to test the extent and means of information possessed by the witness, in regard to the character of the party impeached for truth and veracity. By allowing such inquiry, it may perhaps be made to appear that the imputed bad character is wholly factitious, and got up for a particular purpose.

It seems to be well settled, that whenever general evidence

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is given impeaching the credit of a witness, the opposite party may go into a cross examination to ascertain the grounds of the unfavorable opinion expressed, and in doing so, may interrogate the witness as to his opportunities for knowing the character of the impeached witness; how long a time generally the unfavorable reports have prevailed; and from what particular individuals they heard them. *Lower* v. *Winters*, 7 Cow. 263; *Wadsworth* v. *Pacific Ins. Co.* 4 Wend. 33; *State* v. *Howard*, 9 N. H. 485; 2 Phillips's Ev. Cowen & Hill's Notes, 770. From the nature of the case, a good deal of latitude may very properly be allowed on a cross examination.

The next and fourth exception is to the following ruling: The defendant asked one of his witnesses, whether from the treatment and conduct of the community generally towards the witness sought to be impeached, and the remarks made about him, he knew enough about the general character of such witness, to say what it was for truth and veracity. This question was objected to by the plaintiff, and the court ruled that it should be so altered, as to confine the witness to what he had heard; and that in answering the question, he should not take into account the treatment and conduct of the community towards the person sought to be impeached.

This ruling was surely in perfect accordance with the well-settled and familiar rule of law upon the subject. The proper inquiry of the witness was, what was the reputation for truth and veracity of the person impeached, that is, what was his character in this respect, by report; what was said in regard to it. This was the proper inquiry, and the only proper inquiry; and to this inquiry the witness was permitted fully to answer. For a witness to undertake to say what is the character of an individual for truth and veracity, from the "treatment and conduct of the community generally towards him," would be quite too speculative and conjectural.

The fifth and last exception was as follows: The plaintiff introduced testimony tending to prove a conspiracy between the defendant and one King, to hire one Adams to commit

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perjury in this case; and that King, who lived in Sheffield, Connecticut, ten miles distant, had been requested to attend as a witness, but was not present. The plaintiff called a witness, who testified, among other things, that he lived next door to King, and had seen him every day during the week of the trial. The defendant, on cross examination, asked this witness, if he did not know that King was a member of a church in Sheffield. The plaintiff objected to this question, and the court sustained the objection. To this ruling the defendant excepted. The ruling was undoubtedly correct. The inquiry was wholly irrelevant and immaterial.

Exceptions overruled, and judgment on the verdict.

WELLS FOWLER & others *vs.* LUCIUS F. THAYER.

Where a case is referred to arbitrators, to report a statement of facts for the consideration of the court, they have no authority to admit the parties as witnesses. Whether, in this state, joint disseizors, entering without title, or color of title, are joint tenants, or tenants in common, — *quære.*

THIS was an action of trespass *quare clausum fregit*, brought by Wells Fowler, John Fowler and Charles Fowler, three out of five of the heirs at law of Porter Fowler, and Luke Bush and Seth Bush, residuary devisees of Asahel Bush; and was submitted to referees, with the agreement "that the duties of the referees shall be confined to reporting a statement of facts, and that the case shall be presented to the court upon that report as an agreed statement of facts, the court to draw such inferences as should be properly drawn from the facts so reported."

The referees, having met the parties, and heard their respective proofs and allegations, reported the facts substantially as follows, so far as they are material to the understanding of the opinion of the court: —

Porter Fowler and Asahel Bush, in 1814, entered upon the land in controversy, and enclosed, cultivated and depastured

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it for two or three successive years. In 1817, or about that time, part of the fence was removed, and the rest of the fence suffered to go to decay; and no subsequent acts of ownership were shown to have been performed by Porter Fowler, or by his heirs since his decease, which took place about 1825. Asahel Bush survived him some years, and died leaving a will sufficient to pass the estate of which he died seized, and in which the lot in question was not specifically devised. Asahel Bush, during his lifetime, occasionally cut and took from the lot a few loads of poles for fencing. The plaintiffs proved the cutting and drawing of two loads from the easterly part of the lot, by the defendant, which was the act charged in the plaintiffs' declaration; but the witness was unable to fix the time of such cutting. Two of the plaintiffs were thereupon permitted by the referees, the defendant objecting, to testify to the time of the transaction, showing it to have been immediately preceding the date of the writ.

As the court ultimately decided the case on the ground that the trespass charged was not legally proved, it is unnecessary to set forth the title under which the defendant justified; or the arguments of counsel, which were presented in writing, mainly on the comparative merits of the plaintiffs' and defendant's titles, by *W. G. Bates*, for the plaintiffs, and *P. Boise*, for the defendant.

Shaw, C. J. This is an action of trespass upon land, and depends upon the question of legal title. The evidence of title shown by either party is very slight; but slight as it is, that which is sufficient to turn the scale must prevail.

The plaintiffs claim to be tenants in common, on the ground that their predecessors, Porter Fowler and Asahel Bush, entered upon the land in controversy, and enclosed, cultivated and depastured it for two or three years, successively, without deed or other apparent title, or color of title.

This being trespass for a violation of the plaintiffs' right of possession, and as there was no possession shown on the part of the Fowlers, except the possession which follows the right of property, if they prove no title to the property, they cannot maintain trespass, and are not rightly joined as plaintiffs in this action.

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The argument on the part of the defendant is, that the only color of title, shown by the plaintiffs' predecessors, was by disseizin, by an entry *in pais*, and continuing some time in possession, without deed given by them to another, or by another to them, which might be supposed to qualify such disseizin; that such joint disseizin constituted a joint tenancy at common law, not affected by the statute (Rev. Sts. c. 59, § 10), giving to conveyances and devises of land to two or more jointly, the effect of making them tenants in common; so that upon the death of Porter Fowler, his legal interest as joint tenant vested in Bush, and no title descended to his heirs. One answer intimated in the able argument of the plaintiffs is, that if this objection is valid, it would apply in all cases, where a plaintiff claims without deed, so that if one die seized, and his children, and the children of a deceased child, relying on his and their possession, should join in a suit, they must be defeated, having no deed to prove them tenants in common. This answer we cannot consider satisfactory. In the case supposed, the children and grandchildren would claim, not by disseizin, but by descent; and on proving the seizin and death of their ancestor, and the fact of their being such children and grandchildren, the statute makes them tenants in common in equal shares. Rev. Sts. *c.* 61, § 1.

But the court have not thought it necessary to express an opinion upon this question, because there is another ground for decision, more simple, perhaps, and quite decisive.

It appears that the parties had submitted their case to referees, to report a statement of facts, in order to present the questions of law, which might arise in the case, to the court, without the intervention of a jury, under an agreement that the duty of the referees should be confined to reporting a statement of facts.

In order to prove a fact, material to the plaintiffs' case, the referees, against the objection of the defendant, admitted two of the plaintiffs themselves to testify. It is not contested, that in an action of trespass to land, the parties are incompetent witnesses. But it was insisted, that referees have an

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extraordinary power, and may at their discretion receive such evidence as they think proper; and the case of *Fuller* v *Wheelock*, 10 Pick. 135, was relied on. Nothing is more likely to mislead than the identity of terms, when used in different senses. Suppose it were true, that referees, or arbitrators, constituted judges by the parties, as well in regard to questions of law as to questions of fact, with power to hear and determine on the rights of the parties, in any reasonable manner, legal or equitable (a proposition to be taken with some qualification), it would not follow, that these referees had that authority. They are expressly limited to the duty of reporting a statement of facts, restraining them from deciding on any questions of law. It was for the purpose of presenting the case to the court, on the same grounds, as upon a special verdict, and a special verdict must be upon strictly legal evidence. The court are of opinion that the testimony of the plaintiffs ought not to have been admitted, and that the fact proved by it must be stricken out. Without it, there is no proof of the trespass charged, and the defendants are entitled to judgment.

ASHBEL DICKINSON *vs.* THOMAS WINCHESTER & another.

Where a father, with a view to the residence and employment of his minor son in a distant place, but without emancipating him, furnished him with various articles of clothing, and other things for his personal use, and also with a sum of money for general purposes, without any specific instructions as to the appropriation or use thereof; and the son, on the way to the place of his destination, bought other clothing with the money so furnished, without any directions from his father; it was held, that the clothing furnished to the son by the father, but not that which was purchased by the son, was the property of the father, who might maintain an action for the loss or injury thereof.

The keeper of a public house in the neighborhood of a railroad station, having given public notice that he would furnish a free conveyance, to and from the cars, to all passengers, with their baggage, travelling thereby, who should come to his house as guests; and for this purpose, having employed the proprietors of certain carriages, to take all such passengers, free of charge to them, and to convey them and their baggage to his house; if a traveller by the cars, to whom this arrangement is known, employ one of the carriages thus provided to take him and his

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baggage to such public house, and his baggage is lost or stolen on the way, through a want of due care or skill on the part of the proprietor of the carriage or his driver, the keeper of the house will be liable therefor in assumpsit or case.

This was an action of assumpsit for the loss of a trunk and its contents. The trial was before *Wells*, C. J., in the court of common pleas.

The evidence was conflicting, but tended, among other things, to prove the following state of facts: —

The plaintiff, who resides in Vermont, made arrangements for his son, then of the age of nineteen years, to go to Milwaukie (Wisconsin), there to reside as a clerk. The length of time he was expected to remain was uncertain. Previous to the departure of his son, the plaintiff furnished him with various articles of clothing and some books, &c., and about $60 in money. The son went to New York, and there purchased various other articles of clothing with the money thus furnished to him by the plaintiff. While in New York, circumstances transpired which decided him not to go to Milwaukie, and by direction of the plaintiff, he started on his return home by the way of Springfield, where the defendants resided and kept a public house.

The defendants had previously issued a card, of which the following is a copy: "Exchange Hotel, Springfield, Mass. D. D. Winchester & Son. Free carriage to and from the cars."

The son of the plaintiff had stopped at the house of the defendants on his way to New York, and on leaving was presented with one of these cards.

The defendants had made arrangements with certain hackmen to take any persons from the cars who were going to their house as guests, and convey them and their baggage to the defendants' hotel without any charge to the guests, the defendants paying the hackmen for this service.

On the day mentioned in the declaration, the son of the plaintiff arrived in Springfield, from New York, in the cars. He there recognized the hackman employed by the defendants, who had been a porter in their employ, and informed him of his intention to go to the defendants' hotel, as a guest,

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and gave him the trunk in question to be taken by him to the inn, he himself getting into the hack, and riding to the defendants' house, where he passed the night.

The trunk was put upon the rack of the carriage by the driver, one Howe, but was lost or stolen on the way from the cars to the inn. The trunk was not fastened, nor was any one on the back of the carriage to guard it; but the defendants contended and introduced evidence tending to prove, that, owing to the peculiar construction of the rack, this mode of conveying the trunk was a safe and proper one. This was controverted by the plaintiff, and the question was submitted to the jury under instructions hereinafter stated.

The contents of the trunk consisted mainly of articles of clothing furnished by the father, as before stated, and clothing purchased in New York, with money so furnished by the plaintiff.

The defendants contended, that upon this evidence the trunk and clothing must be deemed the property of the son, and therefore that this action could not be maintained.

On this point the court ruled and instructed the jury, that if the trunk and its contents consisted of articles furnished by the plaintiff for his minor son, or were purchased by the son with money furnished by the plaintiff, the legal presumption was, that the father only loaned them to the son for use, and the property still remained in him, and that this presumption could only be rebutted by proof, on the part of the defendants, that these articles were an absolute gift from the plaintiff to his son. But if the plaintiff had emancipated his son, then the legal presumption would be, that the articles which were furnished, or were permitted to be retained at the time of emancipation, or were furnished afterwards, were intended as a gift, and would put upon the plaintiff the burden of proving facts which would show that the property in them remained in him.

In view of the evidence in this case, the presiding judge instructed the jury, that the plaintiff was entitled to recover, provided they were satisfied that he had proved the following facts: 1st, That he was the owner of the trunk and its con-

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tents, regard being had to the instructions hereinbefore stated; 2d, That the defendants were hotel keepers; 3d, That defendants had given public notice, that they would take passengers arriving at Springfield in the cars, and going to their hotel, as guests, with their baggage, and transport them to their hotel free from charge; 4th, That they had made arrangements with a hackman to receive such passengers and transport them and their baggage to and from their hotel, free of charge to such passengers, and at the charge of the defendants; 5th, That the plaintiff's minor son, knowing of this arrangement, and intending to avail himself of it, did notify the hackman thus employed of his intention, and did deliver the trunk into the custody of said hackman, to be transported to the hotel of the defendants; 6th, That the trunk was lost or stolen while so in the charge of the hackman; and 7th, That this loss was occasioned by the want of due and reasonable care on the part of the hackman, while the trunk was in his charge.

The defendants also contended, that the plaintiff could not recover, because the evidence did not show any contract between him and the defendants, or prove any consideration moving from the plaintiff. But the court ruled and instructed the jury, that upon the evidence the son of the plaintiff might be regarded as his agent in making the contract for the transportation of the trunk, and any consideration moving from him would enure to the plaintiff's benefit.

The defendants further contended, that the evidence showed that the defendants were not to pay the hackman, unless he brought the baggage intrusted to his charge to their hotel; and they requested the court to instruct the jury, that if they should find such to be the fact, it would exonerate the defendants from all liability in this action.

But the court instructed the jury, that unless this condition were known to the public, and so constructively to the plaintiff, of which there was no evidence, the above fact, if found for the defendants, would not affect their liability.

The jury returned a verdict for the plaintiff, and the defendants thereupon alleged exceptions.

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W. G. Bates, for the defendant.

1. The ruling was wrong as to the property in both lots of clothing. The presumption is, that the clothing furnished by the father to the son before he left home was a gift to the son. At all events, the clothing purchased by the son in New York was his property. 2 Russ. on Cr. 1135; *Haynes's Case*, 12 Co. 113; *Grant's Case*, 5 Law Rep. 11, 15.

2. The defendants are not liable. A gratuitous carrier is liable only for gross negligence; a carrier for hire, for ordinary care. Here the hire was not paid by passengers, but by the defendants. The driver was not the servant of the defendants. *Quarman* v. *Burnett*, 6 M. & W. 499; Story, Ag. § 554, a; *Milligan* v. *Wedge*, 12 A. & E. 737; *Rapson* v. *Cubitt*, 9 M. & W. 710; *Laugher* v. *Pointer*, 5 B. & C. 547.

G. T. Davis, for the plaintiff.

1. The son not having been emancipated, the father was the owner of all the clothing, both of that furnished by him to the son, and of that bought by the latter. *Benson* v. *Remington*, 4 Mass. 418; *Smith* v. *Smith*, 7 Car. & P. 401; Rev. Sts. *c.* 97, § 22.

2. In all the cases cited to the point of agency, there was no contract between the third person and the principal; here there was. See *Stone* v. *Codman*, 15 Pick. 297. The defendants, having held themselves out as hackney coachmen, are equitably estopped to deny their liability; even if not liable under the general law of carriers. Story, Bailm. § 498; Story, Ag. §§ 453, 454.

Shaw, C. J. This is a case of new impression, and it may perhaps be doubted, whether, upon the evidence, the verdict upon some of the grounds should not have been the other way. But it is not certain that we have a full report of the evidence, and our concern is only with the correctness of the instructions, under which the case went to the jury. We are of opinion, that the directions were right, except as to the clothes purchased by the son with the money furnished to him by the father, when the son left home, for general purposes, and without any specific directions to purchase clothes with it. Those clothes, therefore, which were pur-

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chased with this money, were not, we think, the property of the father at the time of the loss, and damages should not have been given for them. If the other clothes had been given to the son, or the son had been emancipated, the verdict should have been the other way, and so the judge directed.

The true ground, we are of opinion, on which the claim of the plaintiff rests, is that of an implied contract, and not the mere negligence of the driver of the coach as the defendants' servant. The defendants, by their card, had given previous notice to passengers generally, and to the plaintiff's son in particular, that a free passage should be furnished to their hotel, for all passengers arriving by the cars, who should choose to come there, and they had in fact engaged with the owner of the carriage, which the plaintiff's son entered, and to whom he delivered his trunk, to bring passengers at their expense. When, therefore, such coach owner or his driver thus employed undertook to carry the plaintiff's son, and took charge of his baggage accordingly, such person became the agent of the defendants *pro hac vice*, and they became responsible that he should exercise due care and skill in performing the duty, which the defendants had undertaken to do for the plaintiff.

Whether it be considered that the defendants are to be charged as innkeepers, who assume the care of the guest and his baggage at the station, instead of waiting for his arrival at their own door or stable, or whether they are to be considered as common carriers of persons, who are responsible for the care of passengers' baggage as incident, is perhaps immaterial. In the latter character, such responsibility attaches. *Brooke* v. *Pickwick*, 4 Bing. 218. In either case, the consideration for the undertaking is the profit to be derived by the innkeeper from the entertainment of the traveller, as a guest, and an implied promise is founded upon such consideration. It was argued for the defendants in the present case, that the proprietor of the carriage, whose servant the driver was, who lost the trunk, was carrying on a separate employment, and that he, and not the defendants,

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was the person to whom the plaintiff must look for redress; and, in support of this view, the cases of *Bush* v. *Steinman*, 1 B. & P. 404, *Laugher* v. *Pointer*, 5 B. & Cr. 547, and *Milligan* v. *Wedge*, 12 Ad. & El. 737, were cited. If the *gravamen* of the plaintiff's complaint had been the negligence of the driver, in committing a tort on his person or property by careless driving, or other negligence, there would be much force in this argument, which is founded on the rule, that every man is responsible for damage done by his servant to another, in the conduct and prosecution of his business; as if, in the present case, the driver, in passing from the station to the inn, had negligently run over a person, the remedy might have been against the carriage owner, and not against these defendants. And it is often a difficult question, in complicated cases, to ascertain who is the immediate employer, and to whom the maxim *respondeat superior* applies, as it was found to be in the cases above cited. In the cases of *Laugher* v. *Pointer*, and of *Milligan* v. *Wedge*, no element of contract, of promise on the one side, or confidence reposed on the other, entered into the relations of the parties. They were cases of damage done by one stranger to another, and the question was, who employed the person who did the wrong. But in the present case, travellers are directed by the defendants to come to their inn by carriages employed and paid for by them; confidence is reposed in the driver of such carriage, whether employed immediately by themselves or another; and they are estopped to deny that the person thus actually employed is their agent for that purpose.

If it be a question, whether the plaintiff should declare in case or assumpsit, we are inclined to the opinion, that either is good. There are many cases in which a plaintiff has an election in this respect. Originally every action of assumpsit treated a breach of promise as a tort; and even on a plain note of hand, the old form was, to declare that the defendant, subtly and wilfully contriving and intending to defraud, &c., made a promise and refused to keep it. This form of action was resorted to, as we all know, to avoid the

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defence of wager of law, to which the plaintiff was liable in a formal action of debt. The same rule applied to warranties of personal property, and to the performance of other duties. The plaintiff may set forth a duty, and aver a fact in violation of it as a tort, or aver an implied promise to perform it, and a failure to perform that promise. But upon the right of the plaintiff to recover, the court are of opinion, that though the case is new in regard to the facts, the rule is settled by the salutary principles of the common law. The practice of travelling on railroads is recent; from its nature it must necessarily give rise to new usages, and must create some new interests and relations between travellers and innholders, requiring a just and reasonable adaptation of the rules of the common law. Travellers cannot by this mode of conveyance be carried to the doors of inns and hotels; it is therefore for the mutual interest and benefit of both, that some confidential relations should be established between them, the mutual duties of which should be regulated by the plain dictates of convenience, policy and justice.

On the question, whether the father can sustain the action, we think it is not necessary that the plaintiff himself should have been the traveller and guest; so far as his property is affected, he may recover, though the traveller and guest be his agent or servant, or a party standing in that relation. *Mason* v. *Thompson*, 9 Pick. 280.

On the ground of misdirection in regard to damages, if not adjusted by the parties, there must be a new trial.

CHARLES THOMPSON *vs.* NEWELL SNOW & others.

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In all cases of proceedings in insolvency instituted *in invitum*, St. 1844, c. 178, § 9, requires that notice should be given to the debtor before the warrant is issued, and without such notice the proceedings are void.

Where a warrant in insolvency is issued against partners, on the petition of a creditor, without previous notice to them, a formal waiver of notice, filed by one of the partners with the commissioner, does not make the proceedings good as against his copartner.

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Thompson v. Snow & others.

THIS was a proceeding by petition under the equitable jurisdiction of the court in matters of insolvency.

The petitioner set forth, that in the year 1827, he formed a copartnership in trade with Hollis Thompson, under the name and style of C. & H. Thompson, which continued to the 8th of November, 1848, on which day, Daniel W. Alvord, esquire, commissioner of insolvency for the county of Franklin, issued a warrant under his hand and seal, of which the following is a copy: —

"L. S. To the sheriff of the county of Franklin, or either of his deputies. Whereas Newell Snow of Colerain in the county of Franklin has this day presented to me, Daniel W. Alvord, of Greenfield, commissioner of insolvency for the county of Franklin, his petition setting forth that Charles Thompson and Hollis Thompson, both of Colerain aforesaid, copartners in trade, under the firm of C. & H. Thompson, are indebted to him in the sum of five hundred and eighty-nine dollars and ninety-six cents and upwards, according to a certain promissory note, which note is as follows: '$589·96. Colerain, October 25, 1848. For value received we promise to pay to our own order, five hundred and eighty-nine dollars and ninety-six cents on demand and interest, being for balance of account due Griswoldville Manufacturing Co.,' and signed C. & H. Thompson, and indorsed in blank by said C. & H. Thompson, for which said sum the said petitioner is now entitled to maintain an action against the said C. & H. Thompson, and further setting forth that the goods and chattels of the said C. & H. Thompson were, on or about the twelfth day of June last, attached on mesne process for the sum of one hundred dollars or upwards, in a civil action on a writ at the suit of one Thomas Barber of Colerain aforesaid, which writ was returnable at the court of common pleas holden at Greenfield, within and for the county of Franklin, on the second Monday of August last past, and although the said writ was duly returned to our said court at the return day thereof, and duly entered of record therein, and although the said court has adjourned without day, and the said term of the said court has passed, the said C. & H. Thompson did not, on or before the last day of the said term of the said court, to which said writ was returnable, dissolve said attachment, but the same was continued after the last day of said term; and praying that a warrant may issue to take possession of the said estate, joint and separate, of the said C. & H. Thompson, for the benefit of their creditors, and that such further proceedings may be had in the premises, as the law in such cases prescribes.

Therefore you are hereby required, as messenger, to take possession of all the estate, real and personal, of the said insolvent debtors, excepting such as is by law exempted from attachment, and of all their deeds, books of account and papers, and keep the same safely, until the appointment of an assignee or assignees. And you are also required to give public notice, by advertisement to be published three weeks in the newspaper called the Franklin Democrat, printed at Greenfield, the first publication to be made forthwith, that this warrant has issued, that the payment of any debts and the delivery of any prop

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erty belonging to said insolvent debtors, to them or for their use, and the transfer of any property by them, are forbidden by law; that a meeting of the creditors of the said insolvent debtors will be held at the office of Whiting Griswold, in Greenfield, on the first Tuesday of December next, at ten o'clock in the forenoon, for the proof of debts and the choice of an assignee or assignees; and you are further required to notify the said Charles Thompson and Hollis Thompson of the issuing of this warrant, by delivering to each of them an attested copy of this warrant. You will also send written notice, within ten days after the date hereof, to the creditors of said insolvents, named on the schedule of creditors to be delivered to you by them within three days after the date hereof, of the time and place of said meeting. You will there have this warrant with your doings therein. Witness my hand and seal this eighth day of November, in the year one thousand eight hundred and forty-eight."

The petitioner further alleged, that in conformity with the above warrant, and without any legal notice to him of the institution or pendency of the proceedings therein mentioned, his property and that of the firm of C. & H. Thompson were taken into the possession of Henry Frink, acting as messenger under the warrant; that John Wilson was afterwards appointed assignee, and took possession of the same property; that the petitioner was required by a summons under the hand and seal of the commissioner, to appear before him and submit to examination in relation to matters and things touching the alleged insolvency of C. & H. Thompson, and was requested by the assignee, and refused, to sign a schedule of the creditors of the same; that, in point of fact, it was not true that the goods and chattels of C. & H. Thompson, or of either of them, were attached, as stated in the petition upon which the warrant was issued; nor did it appear that the commissioner so found; nor had the petitioner, prior to the issuing of the warrant, any notice or opportunity to contest the proceedings.

The prayer of the petition was, that an order might be passed, enjoining the commissioner and the creditor from proceeding further against C. & H. Thompson, as insolvents, directing the assignee to surrender to the petitioner the property taken from him, and vacating and annulling all the decrees and acts of the commissioner in the premises.

The case was submitted to the court upon the following agreed statement of facts:—

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On the 8th of November, 1848, the respondent Snow presented a petition, in the usual form, to the commissioner, Alvord, another of the respondents, praying that a warrant of insolvency might issue against the joint and separate estate of C. & H. Thompson, alleging for cause the existence of an attachment against them not dissolved according to law. On the same day, and without notice to C. & H Thompson, the commissioner issued his warrant, according to the prayer of the petition, and in the form already stated.

These proceedings were not known to the petitioner, until the service of the warrant. But Hollis Thompson, his partner, knew of them and made no objection; and, before the presentation of Snow's petition to the commissioner, expressed his determination to the commissioner to put the firm of C. & H. Thompson into insolvency, by a proceeding on his own voluntary petition, before the then next November term of the court of common pleas, unless they should previously be thrown into insolvency on the petition of a creditor. But Hollis Thompson was not present at the time Snow's petition was presented, and did not, in form, waive notice until after the issuing of the warrant.

At an adjourned first meeting of creditors, held in pursuance of the proceedings above stated, on the 12th of December, 1848, Hollis Thompson filed before the commissioner a waiver in writing, signed by him (but not assented to or known of by Charles Thompson), which was placed on file among the papers in the case, and of which the following is a copy:—

"FRANKLIN, ss. December 12th, 1848. I, Hollis Thompson of Colerain in said county, in behalf of myself individually, and of the firm of C. & H. Thompson, of which said firm I am a member, hereby waive any right which I or said firm may have to object to the proceedings in insolvency against said firm, now pending before Daniel W. Alvord, commissioner of insolvency for said county, or any part of said proceedings, in consequence of any want of notice of the pendency of said petition before the issuing of the warrant, or on account of any defect in the attachment on which said proceedings are founded."

A schedule of the creditors of C. & H. Thompson, signed by Hollis Thompson in the name of the firm, was furnished

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by him to the messenger; and at the first meeting of the creditors, Hollis Thompson also presented a schedule of the property of the firm, signed by him in their name, and sworn to by him, together with schedules of his own private creditors and property, signed and sworn to by him in his own name. Charles Thompson likewise furnished the messenger with schedules of his private creditors and of the creditors of C. & H. Thompson, but did not sign them. At the first meeting of the creditors, Charles Thompson came to the place of meeting, and requested the commissioner to let him have the last-mentioned schedules for some purpose which he did not disclose. The commissioner refused, and thereupon Thompson immediately left the room, and has never attended any other meeting of the creditors, although served with a notice, signed by the commissioner, to attend an adjourned first meeting.

The attachment on the writ of Thomas Barber, against C. & H. Thompson, which was the basis of the proceedings in insolvency, as appears by the officers' return, was as follows: —

"FRANKLIN, ss., June 12th, 1848, at thirty minutes past 12 o'clock, P. M. By virtue of this writ I attached all the right, title and interest the within-named defendants have in right or in equity in any real estate within the towns of Heath and Colerain, and also in all and any real estate within the county of Franklin; and all the right and title of either in the same. S. H. Reed, Sheriff."

"FRANKLIN, ss. July 19th, 1848. By virtue of this writ I attached a chip, the property of the within-named defendants, and soon after on the same day I left at the dwelling-house of the within-named Charles Thompson and Hollis Thompson, each of them a summons for their appearance at court. H. Frink, D. Sheriff."

On the 12th of June, 1848, when the first attachment was made, Charles Thompson owned in his individual capacity real estate to the amount of more than $100; C. & H. Thompson owned jointly equities of redemption of land in Heath and Colerain, each of which was worth more than $100, and Hollis Thompson was the owner of an equity of redemption of certain real estate, but whether of any value or not, was not known. These facts appeared to the satisfaction of the commissioner, at the time of the presentation of

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the petition to him; but he made no formal adjudication thereon, other than the issuing of the warrant. The amount of debts proved at the first meeting of creditors against the firm of C. & H. Thompson was $7074·22.

G. T. Davis, for the petitioner.

W. Griswold, for the respondents.

Shaw, C. J. This is a petition by Charles Thompson to this court, to vacate and supersede proceedings in insolvency commenced against the petitioner and Hollis Thompson, on the petition of Newell Snow. The latter was a proceeding *in invitum*, commenced by a creditor, alleging an attachment on mesne process of the estate of Charles and Hollis Thompson; a return of the writ and an entry of the action; and that the debtors did not take measures to dissolve such attachment before the termination of the return term. This brings the case within the provisions of the insolvent law. *St.* 1838, *c.* 163, § 19.

It was contended, that under the very general terms in the return of the officer, there was no sufficient attachment of the property of the debtors, to bring the case within the statute. As it is agreed that there was real estate of the debtors, which would be bound by such attachment, we should have been inclined to think it a sufficient attachment, but for the observations in the case of *Dennis* v. *Sayles*, 11 Met. 233. But as it is not necessary, we express no opinion on this point.

The other objection to the validity of the proceedings, that no notice was given to the debtors before issuing the warrant, is decisive. The statute of 1844, *c.* 178, § 9, in all cases of proceeding *in invitum*, requires previous notice to be given to the debtor, and without it the proceedings are void; and such is the construction which has been put upon it. *Buck* v. *Sayles*, 9 Met. 459. Prior to the statute of 1844, previous notice to the debtor was not required. *Kimball* v. *Morris*, 2 Met. 573. But by that statute, such notice is required in all cases, where the proceedings are *in invitum* commenced by a creditor.

Nor do we think that the proceedings against Charles

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Thompson can be made good, by the formal waiver of notice given in this case by Hollis Thompson, after the proceedings commenced, even if jurisdiction could be given to the commissioners by consent of parties. We are not to assume, merely because it is so averred in the petition, that the two individuals were partners, or that there was any outstanding partnership debt. Charles Thompson had a right to be heard, and *non constat*, if he had had the notice the law requires, that he would not have contested both those allegations, and contested them successfully.

All proceedings vacated and superseded.

CHARLES THOMPSON, JR., *vs.* HOLLIS THOMPSON & others.

One partner, after a dissolution of the partnership, may commence proceedings in insolvency under *St.* 1838, *c.* 163, § 21, by his sole petition, so as not only to affect his own property and the property of the firm, but also the separate property of his late partners.

The term "insolvency," as used in the insolvent laws, does not mean an absolute inability of the debtor to pay his debts, at some future time, upon a settlement and winding up of all his affairs, but a present inability to pay in the ordinary course of business.

Before the issuing of a warrant in insolvency against a partnership, on the petition of one partner, notice to the other partners, though not prescribed by law, may be required by the commissioner, in his discretion; and any partner not so notified may apply to this court, under *St.* 1838, *c.* 163, § 18, to suspend and vacate the proceedings, on showing that the partnership is not insolvent, and that there was no foundation for the allegation of insolvency, on which the proceedings were instituted.

Where proceedings in insolvency, instituted against a partnership, on the petition of one partner, without previous notice to his copartners, are suspended by this court, on the application of a partner not so notified, the case will be referred to a master to inquire and report as to the truth of the statements upon which the proceedings were commenced, before making a final decision.

4c 127
148 270
148 272
4c 127
153 244
4c 127
166 383
166 385
4c 127
183 *499

THIS was a proceeding by petition under the equitable jurisdiction of the court in matters of insolvency. The petition was dated December 9th, 1848, and filed on the 14th of January, 1849.

The petitioner, Charles Thompson, Jr., set forth, that in the year 1840 he entered into a copartnership in trade with

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Charles Thompson and Hollis Thompson, under the firm of C. & H. Thompson and company, which continued until the 25th of January, 1848, when it was dissolved by mutual consent, and a notice of the dissolution was signed by the parties, and published; that after such dissolution, the petitioner formed a copartnership in trade with Hollis Thompson, 2d, and Samuel Thompson, his brothers, which has ever since continued; that Hollis Thompson, senior, has for many years been a copartner in trade with Charles Thompson, senior, under the firm of C. & H. Thompson; that, on the 8th of November preceding the date of the petition, a warrant was issued by Daniel W. Alvord, esquire, commissioner of insolvency for the county of Franklin, declaring the insolvency of Charles and Hollis Thompson, and directing a messenger to take possession of their property, and appointing a meeting of their creditors on the 5th of December following, at which time a meeting was held, and an assignee chosen of the joint and separate goods and property of the said Charles and Hollis, which assignee has since accepted the trust; that, on the 6th of the same December, Hollis Thompson, senior, presented a petition to the commissioner of insolvency, setting forth therein that he was then one of the partners in the firm of C. & H. Thompson and company, which was insolvent; that he wished to surrender the joint and separate property of the same, and of the individual partners thereof for the benefit of creditors, and to obtain a discharge from his debts, and praying that a warrant might issue accordingly; that, upon this petition, the commissioner issued a warrant, dated the same day, directed to Thomas R. M'Gee, one of the respondents, as messenger, by whom a part of the personal property of the petitioner was seized, and who demanded the household furniture and books of the petitioner, and announced his intention to take the same, in pursuance of such warrant; that the allegation of Hollis Thompson, in his said petition, that the firm of C. & H. Thompson and company were unable to pay their debts in full was untrue; that no action was then pending against them for any debt; that the said

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firm could pay their own debts out of their own assets, and that the petitioner had property enough to pay all their debts and his own also; that he was ready and believed himself to be able to give satisfactory security for every debt for which he was liable as a partner of the firm of C. & H. Thompson and company, and that the proceedings instituted against him by Hollis Thompson were oppressive and illegal.

The prayer of the petition was, that an order might be passed enjoining the said Hollis Thompson, Daniel W. Alvord and Thomas R. M'Gee from prosecuting the last-mentioned proceedings in insolvency, or interfering in any way with the property of the petitioner, or of the firm of C. & H. Thompson and company, and that all the proceedings by the commissioner and messenger, under the petition against said last-mentioned firm, be vacated and annulled.

The commissioner of insolvency, Alvord, one of the respondents, demurred, and the petitioner joined in demurrer.

G. T. Davis, for the petitioner.

1. The partnership being dissolved, Hollis Thompson had no power to put the firm into insolvency. *St.* 1838, *c.* 163, § 21, speaks of persons who "are," not who have been, "partners." *Claflin* v. *Beach*, 4 Met. 392; *Barclay* v. *Phelps*, 4 Met. 397; *Moritz's Case*, 5 Law Rep. 325; *Parker* v. *Muggridge*, 5 Law Rep. 351, 359; *Ayer* v. *Brastow*, 5 Law Rep. 498.

2. Hollis, being himself already insolvent, could not make this application, for all his rights had passed to his assignee. Coll. Part. §§ 853, 854, 875; *Butts* v. *Bilke*, 4 Price, 240.

3. The petitioner was entitled to notice under *St.* 1844, *c.* 78, § 9. *Buck* v. *Sayles*, 9 Met. 459.

4. If this court shall be made satisfied, that the allegation that the partnership was insolvent was not true, they will grant relief under their equity powers in a case like this.

D. W. Alvord, for himself.

1. One partner may put the firm into insolvency, even

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after a dissolution. Coll. Part. §§ 118, 119, 546; *Washburn* v. *Goodman*, 17 Pick. 519, 537; *Carter* v. *Holbrook*, 3 Cush. 331; 3 Kent, 57; *Darling* v. *March*, 9 Shep. 184, 190; *Morse* v. *Bellows*, 7 N. H. 549.

2. If the former proceedings were void from the beginning, they could have no effect on these proceedings.

3. *St.* 1844, *c.* 78, applies only to involuntary proceedings.

Shaw, C. J. This case presents a question, which, though it has been often alluded to, we believe has not been directly decided, namely, whether, after the dissolution of a partnership agreed on and published, one partner can by his own petition commence proceedings under the insolvent laws, so as not only to affect his own property and the property of the firm, but also the separate property of his late partners.

In the opinion of the court, by the true construction of the statute, (*St.* 1838, *c.* 163, § 21,) each partner has that power. It is true, that after a dissolution, neither of the partners can bind the firm, by any new contract; the power given by each to the other, for this purpose, being revoked by a dissolution. But for the purpose of adjusting and liquidating concerns already existing, the collection of debts, disposal of property, payment of partnership debts and the like, the relation of partners continues. They are the owners of the partnership property, and joint debtors and joint creditors, in the same manner as before the dissolution. The insolvent law, in all its operations, regards such past joint concerns only; and all the reasons which relate to the application of these provisions to the case of partners, before dissolution, apply with equal force to their relations after dissolution; the purpose in both cases being to make payment of partnership debts from partnership assets, if sufficient, otherwise to make an equal distribution of the assets amongst the creditors. And the provisions of the statute appear to us to be adapted to such a case. The statute requires that the messenger shall take possession not only of the joint property, but also of the separate property.

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If it be objected, that it is contrary to the principles of copartnership, to enable a partner to charge the separate property of his copartner, we think it is a sufficient answer to say, that the proceeding in question only brings within the operation of the law those funds which are by law liable for the payment of partnership debts. Each partner is by law liable for the payment of the whole debts; and if the joint property is insufficient, such debts are a charge upon the separate property of each partner. By the statute, therefore, in order to effect a final and complete settlement of the partnership affairs, which both the partners and their creditors have an interest in effecting, and which it is the obvious policy of the insolvent law to accomplish, the separate property of each partner must be brought within the reach of the law. But the statute itself takes care that this shall ultimately work no injustice, by directing the assignee to keep separate accounts, and by first applying partnership property to pay partnership debts, and separate property to pay separate debts. The result of this system is, that if the separate property of either partner is more than sufficient to pay his separate debts, the balance shall go, as it ought, to pay his partnership debts. And so, on the other hand, if the partnership effects are more than sufficient to pay the joint debts in full, each partner's share in such partnership effects shall go, as it ought, to the discharge of his private debts. This results from that general principle of law, that as between partners and their creditors, each partner is liable to pay the whole of the partnership debts, without regard to their relative interests as between themselves; and, also, that the whole of each individual debtor's interest in property, whether it consist in separate property, or in his share of the stock of a partnership, is liable for the payment of his separate debts.

It sometimes happens, that a man of ample means enters into copartnership with a young man without property, or of small means, and after transacting business some time, they dissolve and give notice of such dissolution. The partnership, as such, may be embarrassed, perhaps insolvent, while the wealthy partner is amply able to pay all its debts,

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and have a large property beyond. If it be supposed a hardship, that the insolvent partner should have it in his power, by his separate act, to place the whole of the real and personal property of his former partner under sequestration, it appears to us that a satisfactory answer is found in the principles above stated. Such former partner is by law bound to the payment of the partnership debts immediately, as well out of his separate property, as out of partnership property. The partnership creditors are not bound to await the slow and uncertain liquidation of the partnership affairs, the collection of debts, the getting in of property, and the process of winding up an embarrassed concern. The solvent partner may relieve himself from the trouble of such sequestration, simply by doing his duty, paying these debts, and looking to the partnership funds for his indemnity. And whether the funds are sufficient to indemnify him or not, is not the concern of the creditor; the loss will ultimately fall, where it ought to fall, on the solvent partner.

If it be asked, at what time after a dissolution this power of one partner to petition in behalf of the partnership, and place the firm in insolvency, shall cease, it appears to us that the answer in each case must be found in the state of the partnership concerns. By the provision of the insolvent law before cited, § 21, a warrant may be issued in the manner provided in the act, either on the petition of such partners, or of any one of them. The partners, or one of them, shall apply "in the same manner," &c. By this we are referred to the first section of the act, which provides that any debtor, residing in this commonwealth, who shall desire, &c., may apply, &c., setting forth his inability to pay all his debts, his willingness to assign, &c., and praying that such proceedings may be had, &c. And if it shall appear to the satisfaction of the judge, that the debts due from such applicant amount to $500, (since reduced to $200,) he shall forthwith, by warrant under his hand and seal, appoint, &c. This indicates the course to be pursued, *mutatis mutandis*, when the application is made by partners, or by one of them in behalf of the partnership. The petition must show, that debts due from

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them, the partners, are not less than $200; and it must set forth their inability to pay them, their desire to obtain a discharge, and their willingness to assign. These are the facts, and this the case, in which alone the proceedings can be instituted; and so long as this state of things continues, there seems to be no good reason why a commission should not issue to reach their joint property, and also the property liable for the partnership debts, namely, the separate property of all the partners.

One ground, on which the petitioner prays that the proceedings may be suspended, deserves consideration, which is, that he had no notice of the application of his former partner, before the warrant issued. This is not a case where the statute has, in terms, required that notice shall be given. The statute provides, in terms, for the case of the voluntary application of the debtor, and of course there is no occasion for notice to him. The next case is the application of partners; and if made by all of them, notice to them is of course equally unnecessary. The case of one partner applying in behalf of himself and partners, is put on the same ground, without special provision, probably because such is the mutual duty, interest and relations of partners, that the act of one may be deemed in effect the act of all. We think, therefore, that notice not being provided for by the statute as a legal preliminary, is not a condition, the want of which will avoid the proceedings. But, at the same time, as the proceedings may deeply affect the rights of such partners, the court are of opinion, that it would be quite competent for the commissioner, in the just exercise of his powers, to give such notice before issuing his warrant against such partners, because they have a deep interest in being heard upon two questions of fact, on which the commissioner must pass, namely: 1. Whether the party so named in the applicant's petition is a copartner; and, 2. Whether the firm is insolvent. If these facts do not appear, the case does not exist, upon which the commissioner is authorized by the statute to proceed. But when this is not done, the court are of opinion, that such a partner is a party aggrieved, who may, in a proper case,

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apply to this court, under the provisions of *St.* 1838, *c.* 163, § 18, to suspend and vacate the proceedings and have the property restored, upon showing that the partnership is not insolvent, and that there was no foundation in fact for the allegation of insolvency, on which the proceedings were instituted. By the term "insolvency," however, as used in these statutes, we do not understand an absolute inability to pay one's debts at some future time, upon a settlement and winding up of all a trader's concerns; but a trader may be said to be in insolvent circumstances, when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do. *Bayly* v. *Schofield*, 1 M. & S. 338; *Shone* v. *Lucas*, 3 D. & R. 218.

If this demurrer is withdrawn, we think the proper course will be to refer the case to a master, to inquire and report as to the truth of the facts or statements upon which these proceedings were commenced, and to reserve a final decision until such report shall be made.

ROBERT COOK *vs.* ARIEL HINSDALE.

Two tenants in common, having mortgaged their estate to secure the debt of one of them, assigned their respective interests in the estate to different assignees, who subsequently made partition of the same: The mortgagee brought separate actions against the assignees, to recover of each the parcel of land set to him on the partition; and the assignee of the mortgagor, for whose debt the mortgage was given, (such assignee having been notified, at the time of his purchase, that he would be bound to pay the mortgage), paid the whole amount due thereon, in discharge of the suit against him, under an agreement that he should thereby become the owner of the mortgage: It was held, that he was not entitled to carry on the action brought by the mortgagee against the other assignee, in order to compel the latter to contribute one half of the debt.

THIS was a writ of entry, wherein the demandant counted upon a mortgage made by one Daniel S. Workman to the Massachusetts Hospital Life Insurance Company, dated April 24th, 1834, to secure the payment of a promissory note for $300; which mortgage had been assigned by the mortgagees to the demandant. The case was tried before *Washburn*, J., in the court of common pleas.

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The tenant pleaded the general issue, and specified in his defence, first, payment; and, second, that the real demandant was one Gilbert Green, who was the owner of one half of the premises described in the mortgage deed upon which the demandant's claim is founded, and derived title thereto with the express understanding that the whole amount of the mortgage was to be paid by him, and no part thereof by the tenant; neither the tenant nor those under whom he claimed ever having received any benefit from the mortgage, the whole of which enured to the grantors of Green.

The demandant produced a mortgage deed of the date aforesaid, signed by Daniel S. Workman and Sidney S. Workman, conveying, among other parcels of land, the two lots described in the demandant's writ, and conditioned for the payment of a note for $300, signed by Daniel S. Workman alone. The demandant also produced the note; and the assignment of the mortgage and note to him was proved and admitted.

In the defence it appeared, that after the date of the mortgage, namely, in 1838, Sidney, being embarrassed, made an assignment of his estate to Daniel, and one Shearer, as trustees for the benefit of his creditors under the statute of 1836, *c.* 238; that they held the same until 1840, when it having been ascertained that Sidney was not insolvent, the trustees released the estate to him.

Sidney's title to an undivided half of the estate in question had originally been acquired from his father, who conveyed the same to him May 31st, 1830. Sidney and Daniel were tenants in common.

After the release to him in 1840, Sidney conveyed his undivided half to the tenant by a deed dated February 14th, 1840, with covenants of warranty, except as to one half of two mortgages upon the premises, other than the mortgage in suit. On the 13th of May, 1843, Daniel having become insolvent, a deed was duly executed to Amos Stewart, his assignee, of all his estate under the insolvent laws. On the 19th of March, 1844, Stewart sold the undivided half of Daniel of the mortgaged premises at auction to Gilbert

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Green. Before and at the sale it was stated, in the presence and hearing of Green, that the purchaser would be bound to pay half the two other mortgages and all the mortgage that was upon the estate to the Massachusetts Hospital Life Insurance Company.

After his purchase, Green paid, for one year, at least, in July, 1844, the interest upon the whole of the mortgage now in suit, and half the interest upon the other two.

While Green and Hinsdale, the tenant, owned the estates, a partition of the same was made, whereby each became tenant in severalty of the different parts of the mortgaged premises. After the partition, Cook, the demandant, having become assignee of the mortgage, as before stated, commenced two actions thereon, one against Green to recover the part of the mortgaged premises held by him in severalty, and one against the tenant in this action, which is the present suit, to recover the part held by the tenant in severalty.

While both suits were pending, Green paid to Cook the whole amount due upon said mortgage, under an agreement that he should thereby be made the owner of the mortgage. The suit against Green was afterwards stopped, and he paid the costs of the same. The present suit is prosecuted by Green for his own benefit, in the name of Cook, and by his permission.

Upon the foregoing facts appearing, the presiding judge instructed the jury, that the tenant was entitled to a verdict, and a verdict was thereupon returned accordingly in his favor. The demandant thereupon alleged exceptions.

Parol evidence of what was stated before and at the sale, in the presence and hearing of said Green, that the purchaser would be bound to pay half of the two other mortgages, and the whole of the mortgage now in suit, was objected to by the demandant's counsel, but was admitted by the court.

D. Aiken, for the demandant.

C. Devens, Jr., for the tenant.

Shaw, C. J. Two tracts of land, held by Daniel S. Workman and Sidney S. Workman, as tenants in common, were mortgaged to the Massachusetts Hospital Life Insurance

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Company to secure the payment of the separate note of Daniel S. Workman. All the estate of Sidney subsequently came to the defendant, Hinsdale, subject, of course, to this mortgage, and to some other incumbrances not mentioned. Daniel S. Workman having become insolvent, all his interest in the two parcels of land were conveyed to one Gilbert Green, who paid the interest on the note at least one year. Green and Hinsdale made partition of the lots to hold in severalty. Both parcels were of course subject to the mortgage above named to the insurance company, but for the same debt, and *prima facie* the separate debt of Daniel S Workman.

Cook, the demandant, having become the assignee of this mortgage, brought two actions to foreclose, one against Green for the parcel which was held by him, and the other against Hinsdale for the parcel held by him. Whilst the suits were in court, Green paid the whole amount of the mortgage, and had the suit against him discharged. The other, which is the present suit, is now, by the consent of the nominal plaintiff, prosecuted for the benefit of Green, to enable him, for his own use, to charge the parcel of land held by the tenant for one half of the mortgage debt, which he has paid to the nominal plaintiff.

This claim on the part of Green is purely equitable, in the nature of an equitable assignment; and if he cannot maintain it on this ground, he cannot maintain it at all. If the payment made by Green was strictly speaking a "payment" of the whole mortgage, it would be a bar to both actions, both being brought to recover payment of one and the same debt. But supposing it intended to be a payment of one half, and a purchase of the plaintiff's right to the other half, the court are of opinion that Green has no equity. He took Daniel S. Workman's right only, and that right was to redeem the estate upon the full payment of Daniel S. Workman's debt. Sidney S. Workman's estate, which came to the defendant, was liable for it in law, but it was in the nature of a suretyship. If the suit had been brought against Green alone, to charge the whole mortgage debt on the estate

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held by him, we think he would have had no claim for contribution from the tenant in this case. In paying the whole mortgage, he in effect paid the debt for which his estate was primarily bound, to the exemption of the estate of the tenant; and he was in effect paying his own debt; he had no right in equity therefore to prosecute this suit for his own benefit in the name of the nominal plaintiff. *Allen* v. *Clark*, 17 Pick. 47; *Brown* v. *Worcester Bank*, 8 Met. 47. When Green paid into court the amount of the mortgage, the demandant was not bound to take it and discharge his action, without a tender of the costs in both actions, both suits being rightfully brought, and pending for one and the same debt. *Whipple* v. *Newton*, 17 Pick. 168.

Judgment for the defendant.

MARSHALL WHITHED *vs.* SIMEON MALLORY, JR., & another.

A widow is not entitled to dower in lands, conveyed away by her husband before marriage, although such conveyance was fraudulent and void as against his creditors.

The owner of land before his marriage made a conveyance thereof which was fraudulent and void as against creditors: The grantee conveyed the same to a third person for the consideration of love and affection, after which the grantor married: A creditor of the grantor subsequently levied his execution on the land so conveyed, and the appraisers made a deduction from the value thereof, on account of the possible right of dower therein of the wife of the judgment debtor: In a writ of entry by the creditor against the second grantee to recover the land levied on, it was held, that the wife had no right of dower therein, and that the tenant might avoid the levy, on the ground, that by reason of such deduction a greater amount of land had been taken on the execution than the demandant had a right to take.

THIS was a writ of entry brought in this court to recover a part of a parcel of land in Northfield. Simeon Mallory, one of the tenants, pleaded the general issue, with a specification of non-tenure, and that he claimed only as the servant of Obadiah Mallory, the other tenant, who also pleaded the general issue. The case was tried before *Dewey*, J., by whom it was reported, in substance, as follows, for the consideration of the whole court:—

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It appeared, that the tenant, Simeon Mallory, by a deed dated March 9th, and recorded April 6th, 1816, conveyed the demanded premises to one Moses Mallory, by whom, on the 13th of August, 1819, the same were conveyed to Obadiah Mallory, the other tenant, who was the son of Simeon, and then an infant, for the consideration of love and affection.

The demandant offered evidence to show that the deed from Simeon Mallory to Moses was fraudulent as to the creditors of the grantor. It was also in evidence, that before and at the time of the execution of this deed, the grantor was unmarried, and remained so until his marriage in June, 1818; and that he continued in the occupation of the prem ises after the date of the deed to Moses, and after the time of his marriage, and occupied the estate in the same manner as he had done before.

It was further proved, on the part of the demandant, that at a term of the court of common pleas in the county of Franklin, for the year 1848, he recovered a judgment against Simeon Mallory, and caused an execution issued thereon to be levied on the demanded premises, by an appraisal and setting off of the same to him.

It appeared, by the return on the execution, that the appraisers deducted from the value of the land levied upon the sum of forty dollars, for the possible right of dower in the wife of the judgment debtor.

The demandant claimed the premises in question in virtue of the levy. The tenants contended that the levy was void as against them, on the ground that no possible right of dower existed in the wife of Simeon Mallory.

The judge ruled, that this defence was not one which could avail Obadiah Mallory, if the jury should find that the title of his grantor, Moses Mallory, was under a deed which was fraudulent and void as against creditors; and that it was not open to Simeon Mallory, as he made no claim of title in himself, but wholly disclaimed the same, and set up no other ground of defence than the title of Obadiah, derived through the deed to Moses Mallory.

The jury returned a verdict for the demandant.

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D. Aiken and *W. Griswold*, for the tenant.

C. Devens, Jr., for the demandant, referred to *Hughes* v. *Shaw*, Mart. & Yerg. 323; *Baker* v. *Chase*, 6 Hill, 482; *Buck* v. *Hardy*, 6 Greenl. 162.

Shaw, C. J. The tenants objected to the validity of the levy, on which the demandant claims to recover the premises in question, on account of the deduction made by the appraisers of the value of the supposed right of dower in the wife of Simeon Mallory. If no such right existed, this deduction is wrong; and, as too much estate was set off, and it could not be apportioned, the levy was irregular and void. *Root* v. *Colton*, 1 Met. 345. Upon the facts, we think no such right did exist, or could ever be claimed by the wife of Simeon Mallory, because he was never seized during the coverture. Before his marriage, he had aliened the estate, by a conveyance good against him and his heirs. *Blood* v. *Blood*, 23 Pick. 80. But it was contended, and so the judge directed the jury, that this was an objection that the defendant, Obadiah Mallory, could not make, if the jury should find the title of Moses Mallory to be under a fraudulent deed from Simeon, given only to defraud creditors.

But it is to be considered, that a voluntary conveyance, made to defeat creditors, is not absolutely void, but only voidable; it is good as against the grantor and his heirs. It can only be avoided by creditors, and by them only to an extent sufficient to satisfy their debts. The surplus, if any, remains good to the grantee. If, therefore, a larger amount is taken on execution than the creditor has a right to take, it is a direct injury to the holder; and if this is done in such a mode, that the good and the bad cannot be separated, and the whole is irregular and void, the court are of opinion, that this may be shown by him who holds the land under a voluntary conveyance, not good as against creditors. To test this, suppose there is a voluntary conveyance, which is fraudulent, and admitted to be fraudulent against creditors, of the value of $1000; a creditor obtains judgment for $300, and levies. Various charges and incumbrances on the estate are suggested to the amount of $500, so that the

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debtor's interest is appraised at $500, and three fifths of the estate is set off to satisfy the execution. These imaginary incumbrances, on investigation, are proved to be groundless. If the holder under the voluntary conveyance cannot be permitted to show this, he is deprived of an estate which he has a legal right to hold, without remedy.

Obadiah Mallory, though he took under a deed made by Moses, in consideration of love and affection, and Moses took of Simeon by a conveyance, which was fraudulent as against creditors, yet he had a good title against every body, except creditors, and they can only defeat his title to the extent of their legal claims. The demandant having taken too much, we think it was competent for Obadiah to show this in his defence.

Verdict set aside, and new trial ordered.

Commonwealth *vs.* Calvin W. Shattuck.
Commonwealth *vs.* Patience Bond & another.

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In this commonwealth, as well as in England, the remedy for a forcible entry unlawfully made is twofold, by indictment at common law, and by proceedings under the several statutes relating to forcible entry and detainer.

In order to maintain an indictment for a forcible entry, the entry must be accompanied by circumstances tending to excite terror in the occupant, and to prevent him from maintaining his right: such as apparent violence, unusual weapons or attendance, menaces, or other acts which give reasonable cause to fear, that the party entering will do some bodily hurt to the occupant, if he do not give up the possession.

In an indictment for a forcible entry, it is a sufficient charge of the offence, to allege the entry to have been made unlawfully, with force and arms, and with a strong hand.

The defendants were severally indicted in the court of common pleas, the first named for a forcible entry and detainer, and the others for an assault and battery upon the officer by whom the process, on a complaint of forcible entry and detainer in the first case, was served.

The first indictment alleged, that the defendant, "with force and arms, and with a strong hand, unlawfully, forcibly

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and injuriously did enter into a certain messuage and parcel of land, with the appurtenances, of one John Temple, &c., &c., with a dwelling-house thereon standing, then and there being in the peaceable possession of the said John Tempie, and that the said Calvin W. Shattuck, then and there, with force, as aforesaid, and with a strong hand, unlawfully, violently, forcibly and injuriously, did expel, amove and put out the said John Temple from the possession of the said premises with the appurtenances; and the said John Temple, so as aforesaid expelled, amoved and put out from the possession of the same, with force and arms, and with a strong hand, unlawfully, violently, forcibly and injuriously, has kept out from, &c., and still does keep out, and other wrongs, &c., against the peace, &c., and contrary to the form of the statute in such case made and provided."

To this indictment the defendant demurred, and the district attorney joined in demurrer. The court overruled the demurrer, and the defendant thereupon appealed to this court.*

The indictment, in the second entitled cause, contained two counts. The first alleged, that the defendants committed an assault and battery upon one Samuel Potter, a deputy sheriff, while in the due and lawful exercise of the duties of his office, and obstructed, hindered and opposed him therein. The second count charged the defendants with committing an assault and battery upon Potter, not described as an officer, with a flatiron and a billet of wood.

On the trial, which was before *Byington*, J., the district attorney introduced in evidence a warrant issued by a justice of the peace, upon a complaint against the defendants and others, for a forcible entry and detainer of the premises described in the first indictment, which warrant was in the hands of the deputy sheriff Potter for service, at the time of the alleged assault. This evidence was objected to by the

* It was understood, that, by the consent of the attorney for the commonwealth, the defendant should be entitled to a trial on the merits, if the demurrer should be overruled.

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defendant, on the ground that the warrant set forth no offence, and, therefore, that the officer was not required or authorized to serve it; but the evidence was admitted by the court, and there being also other evidence in the case, the jury were instructed, that if they should be satisfied, that the defendants committed an assault and battery upon Potter, while he was in the act of executing the warrant, according to the precept thereof, as an officer, and the defendants knew it, but nevertheless hindered and obstructed him, the defendants would be guilty of the offence charged.

The jury returned a verdict of guilty, and the defendants thereupon alleged exceptions.

The cases were argued together.

D. W. Alvord, for Shattuck.

W. Griswold, for Bond and another.

Clifford, attorney general, for the commonwealth.

Dewey, J. The demurrer to this indictment raises the question as to the sufficiency of the allegations it contains to constitute a charge of an indictable offence. The indictment concluding, as it does, with the averment *contra formam statuti*, may be sustained under our decisions as well as under our statute law, if the facts charged constitute an offence either by statute or at the common law. *Commonwealth* v. *Hoxey*, 16 Mass. 385; Rev. Sts. *c.* 137, § 14. It is proposed, in the first place and more at large, to consider the point whether an indictment will lie at common law for a forcible entry.

The objection taken to such an indictment is, that the offence charged is a private injury, and one more properly cognizable under the head of civil trespass or private wrong, and not a matter of public concern, or affecting public rights. If it were a mere trespass, the objection must avail as it did in *Rex* v. *Storr*, 3 Burr. 1698. A merely unlawful entry upon the land of another, with technical force and arms, but accompanied with no acts beyond a simple trespass, is not an indictable offence. It is also undoubtedly true, that the English statutes having provided another mode of redress, more effectual as to the speedy restitution of the land to the party

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from whom the same has been forcibly taken, than the proceedings by indictment would be, the former has been the mode of proceeding more usually resorted to in such cases; and the same is true as to the remedies in use, and the usual mode of redress provided in many of the states in this union.

But we apprehend that both before and since the enacting of the various statute provisions in England, the remedies for a forcible entry unlawfully made have been twofold, one by indictment at common law, and the other by proceedings under the statutes. In *Rex* v. *Bathurst*, Sayer, 225, it was held, that an indictment lies at common law for a forcible entry into a dwelling-house and expelling the occupants. In *Rex* v. *Bake*, 3 Burr. 1731, Mr. Justice Wilmot says, "Undoubtedly an indictment will lie at common law, for a forcible entry, though the proceedings are generally under the acts of parliament." In *Rex* v. *Wilson*, 8 T. R. 357, 362, lord Kenyon says, "There is no doubt that the offence of forcible entry is indictable at the common law, though the statute gives other remedies to the parties aggrieved." 3 Chit. Crim. Law, 1131; Rosc. Cr. Ev. 374, are also authorities to the same effect.

In this commonwealth, it seems to be assumed, that such an indictment would lie at the common law, in the opinion delivered by Mr. Justice Wilde in the case of *Sampson* v. *Henry*, 13 Pick. 36. In the report of the commissioners for revising the statute laws, in 1835, in their note to the first section of the one hundred and fourth chapter, in which they proposed a new section, not copied from any former statutes, which was to this effect: "No person shall make entry into lands except in cases where his entry is allowed by law, and in such cases he shall not enter with force, but in a peaceable manner;" they say they are only introducing into the statutes a rule fully recognized as a part of our common law, and one plainly implied from the provisions of our existing statutes. *Harding's Case*, 1 Greenl. 22, is to the same point.

This must be so upon sound principles, as the preservation of the public peace requires that the offence should be punished criminally. Individuals are not to assert their claims to real estate, and especially to a dwelling-house, in the actual

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possession of another, by force and violence, and with a strong hand. The peace of the commonwealth forbids it. This principle does not in any degree interfere with the making of a formal entry upon land, preparatory to the bringing of an action at law, and which may be necessary to give a legal seizin to the party, but which leaves those in possession undisturbed as to the actual occupation. Nor does it embrace the case of a mere trespass upon land, as to which the civil remedy is alone to be resorted to. To sustain an indictment for a forcible entry, the entry must be accompanied with circumstances tending to excite terror in the owner, and to prevent him from maintaining his right. There must at least be some apparent violence; or some unusual weapons; or the parties attended with an unusual number of people; some menaces, or other acts giving reasonable cause to fear, that the party making the forcible entry will do some bodily hurt to those in possession, if they do not give up the same. It is the existence of such facts and circumstances, connected with the entry, that removes it from the class of cases of civil injury, to be redressed in actions of trespass or other civil proceedings, and holds the party thus making an unlawful entry amenable to the public as for a public wrong.

Does the present indictment charge such an offence, as we have above described as that of a forcible entry? Charging the entry to have been unlawfully made with force and arms, and with a strong hand, is a sufficient allegation to constitute the offence a forcible entry. The words "with a strong hand" mean something more than a common trespass. By Lawrence, J., in *Rex* v. *Wilson*, 8 T. R. 362, these words are said to imply that the entry was accompanied with that terror and violence which constitute the offence. See Rastall's Entries, 354; *Bande's Case*, Cro. Jac. 41.

It seems to us, therefore, that this indictment does well charge the offence of a forcible entry, and that such forcible entry is an offence at common law. We have considered it solely in the aspect of a charge of forcible entry, which alone is sufficient to maintain the indictment, and renders it immaterial whether it might also be sustained as a charge of

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forcible detainer. So also as an offence against our statutes, if the case required it, it might be proper to consider whether the provision of the Rev. Sts. *c.* 104, § 1, already referred to, and directly prohibiting the doing of the act complained of here, would not make such act a statute offence, punishable under the Rev. Sts. *c.* 139, § 1, as a case where an act was made criminal by a prohibitory statute, but no particular punishment annexed to the offence.

If a forcible entry is thus made a statute offence, then the present conclusion of the indictment, charging it as an offence against the form of the statute, is correct. If, however, it is only an offence at common law, then the allegation just referred to may be rejected as surplusage; and judgment may be rendered upon the indictment, as upon an indictment for an offence at common law. In either view of the case, the demurrer must be overruled.

Demurrer overruled in the first case, and the exceptions overruled in the second.

LORENZO P. MUNN *vs.* AMOS A. STONE & others.

Where the grantor in a deed reserves to himself the privilege of entering the land conveyed, and of taking and carrying away stone therefrom; this is not a reservation of a mere personal privilege to the grantor, but of a right and interest in the use of the land, which the grantor may assign.

THIS was an action of trespass to land, for taking and carrying away portions of a ledge of granite in land alleged to belong to the plaintiff. Whilst pending in the court of common pleas, the action was referred to an arbitrator, who reported a statement of the facts, reserving the questions of law arising thereon, at the request of the parties, for the consideration of the court, and made his award accordingly. The court of common pleas accepted the award, and entered judgment thereon for the plaintiff; and the defendants thereupon appealed to this court.

The plaintiff claimed title to the land in question in virtue

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of a deed with warranty, dated September 27th, 1844, from Obed Severance, who derived his title to the same, by a deed dated February 14th, 1844, from Jonathan Lyman, whose title was not disputed. Both deeds included and purported to convey the land alleged to be trespassed upon.

The deed from Lyman to Severance contained the following reservation: "Reserving to myself the privilege of entering said tract and taking and carrying away stone from the northern part of said tract as far south from the northern end, as the woods now stand in said tract." The subject of this reservation was the granite ledge from which the defendants had taken portions.

In November, 1847, Lyman gave the defendants a writing duly executed, which purported to sell and convey, and, so far as he possessed power, did sell and convey, all the rights to the stone in the granite ledge, which he had reserved to himself by the clause above recited in his deed to Severance.

G. T. Davis, for the plaintiff, cited Shep. Touch. 80; Bro. Ab. 346; *Doe* v. *Lock*, 4 Nev. & M. 807, 824; 3 Kent, 420; *Phillips* v. *Rhodes*, 7 Met. 322; *Jackson* v. *Babcock*, 4 Johns. 418; *Hoffman* v. *Savage*, 15 Mass. 131; *Wadsworth* v. *Smith*, 2 Fairf. 278; *Lord* v. *Lord*, 3 Fairf. 88; *Dyer* v. *Sanford*, 9 Met. 395, 404.

D. Aiken, for the defendants, relied on the case of *Farnum* v. *Platt*, 8 Pick. 339.

By the court. We cannot distinguish between the reservation of a right or privilege of entering on a particular, designated part of a tract conveyed, and carrying away stone, and a reservation of the use of a marble quarry, out of the land conveyed, for a limited time. Whether it is an exclusive use, or a use in common, may be a question; but it is the same in both cases. We think, therefore, that this case is substantially governed by that of *Farnum* v. *Platt*, 8 Pick. 339. The only difference is, that in the case cited, the use reserved was for a term of years; in this case, it is a reservation to the grantor generally, which, being without words of limitation, is a right for his life. We are of opinion, therefore, that the reservation recited did not constitute a mere privilege to

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Lyman to take stone personally, but was a right and interest in the use of the ledge, which was assignable; and the defendants, having obtained a right of him, were not chargeable with the trespass complained of.

Report accepted, and judgment thereon for the defendants.

4c 148
170 163

JONATHAN TOTMAN *vs.* CALEB C. CARPENTER.

The declaration, in an action of assumpsit, contained two counts, the first on an account annexed for goods sold and delivered, &c., the principal item of which was a charge for twelve and a quarter tons of hay, and the second a special count alleging a sale by the plaintiff, and a purchase by the defendant, of thirty tons of hay then in the plaintiff's barn, and to be taken therefrom by the defendant, and a refusal by the defendant to accept or pay for the same. On the trial, it appeared that the hay was sold and delivered, and that the defendant took and carried away a part of the same, namely, the quantity mentioned in the first count, and refused to accept and pay for the residue. The judge, being of opinion that the contract was entire, and that the evidence proved a sale and delivery of the whole quantity of hay, instructed the jury accordingly, who rendered a verdict on the first count for the plaintiff, and on the second for the defendant: It was held, that the two counts were not for several and distinct causes of action within the Rev. Sts. *c.* 121, § 16, and, consequently, that the defendant was not entitled to costs for his witnesses on the second count, on which the verdict was in his favor.

THIS was an action of assumpsit, brought by the plaintiff, as the administrator of James McClallen, and was tried before *Wells*, C. J., in the court of common pleas. The declaration contained three counts. The first was on an account annexed, the principal charge in which was for twelve and a quarter tons of hay. The second was a general count, for goods sold, work and labor done, and materials provided, and for money paid, &c. The third was a special count, setting forth a sale by the plaintiff and a purchase by the defendant of thirty tons of hay, then lying together in one mass in the barn of the plaintiff's intestate, to be there delivered on demand, and at the option of the defendant to take the same as soon as he should choose, at any and all times thereafter, and to be paid for by the defendant on the delivery, at the rate of nine dollars a ton; and alleging that the defendant, though requested, and though the plaintiff had tendered and

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offered to deliver the hay to him, had always refused to accept or pay for the same.

On the trial, it appeared that the plaintiff sold the defendant a mow of hay, consisting of several tons, in the barn of the plaintiff's intestate, which was to be taken therefrom by the defendant; that the defendant took away a part of the hay, namely, the quantity mentioned in the account annexed, and that he refused to take away the residue.

The plaintiff sought to recover, in this action, for the price of the hay taken away, on the first count, and for damages for not taking away and paying for the residue, on the third count. But the judge, being of opinion that the contract was entire, and that the evidence proved a sale and delivery of the whole of the mow of hay, ruled that the plaintiff could not recover on the special count.

The defendant, having specified a tender on the first count, brought the sum tendered into court, and contended that the contract declared on was not proved, and offered evidence to show that no such contract had been made; but the court rejected the evidence, on the ground that the specification of tender and the payment of money thereupon into court were an admission of the contract to which the specification applied, as set forth in the declaration.

The jury returned a general verdict for the plaintiff, which was afterwards amended so as to apply to the first count only, and a verdict was entered for the defendant on the other counts.

The defendant afterwards moved for an allowance of the costs of his witnesses on the counts on which he had a verdict in his favor; but the court disallowed the motion, on the ground, that the several counts in the declaration were not for several and distinct causes of action.

The defendant alleged exceptions.

G. T. Davis, for the defendant, waived the question relating to the tender, and, on the question of costs, referred to the Rev. Sts. *c.* 121, § 16, and the case of *Elder* v. *Bemis*, 2 Met. 599.

A. Brainard, for the plaintiff, was stopped by the court.

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By the court. The exceptions are overruled, and the judgment of the court of common pleas affirmed.

Walter Field *vs.* The Vermont & Massachusetts Railroad Company.

On an appeal to this court from a judgment of the court of common pleas, accepting the verdict of a sheriff's jury, empannelled to revise the estimate of county commissioners, on an application for damages occasioned by the laying out of a railroad, it cannot be objected that the commissioners had no jurisdiction, by reason of the parties having agreed to refer the damages to arbitration; but such objection, if relied upon, must be taken before the commissioners as a ground for not ordering a jury.

This was an appeal by the respondents from a judgment of the court of common pleas, accepting the verdict of a sheriff's jury, on an application of the petitioner to the county commissioners, for a revision of their estimate of the damages occasioned by the laying out and construction of the respondents' railroad over his land.

At the hearing before the sheriff's jury, the respondents introduced in evidence a bond executed by the petitioner to them, on the 26th of September, 1846, conditioned that the petitioner should convey to the respondents so much of his land in Northfield, as they might deem proper to take for the purposes of their road, upon payment or offer of payment of such sum, as John Nevers and Joseph Young should estimate the damage to be, on the portion of the land lying northerly of the maple in front of the petitioner's house, for all said land so taken by the respondents.

It was also in evidence, on the part of the respondents, that John Nevers, named in the bond as one of the persons to estimate the damages, died on the 30th of March, 1847, that the location of the respondents' road over the petitioner's land was duly filed in the clerk's office of the commissioners on the 15th of April, 1847; and that no estimate of damages, as provided in the bond, had ever been made.

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The petitioner objected to the receiving of the bond in evidence, and further objected to its having any legal effect as a bar to damages for any part of his land taken or injured by the respondents' road; but the sheriff ruled that the bond was a bar to any damages for land, taken or injured, lying southerly of the maple-tree referred to in the bond, and instructed the jury to estimate damages only for land taken or injured north of the maple-tree, according to the provisions of the bond, to which ruling the petitioner excepted.

The jury returned a verdict for the sum of $824.

The petitioner thereupon waived his exceptions, and the court of common pleas, overruling a motion by the defendants to set the verdict aside, ordered it to be received, accepted and recorded.

No objection to the jurisdiction of the commissioners was taken before them, on the application for a jury.

D. W. Alvord, for the respondents, now argued that the giving of the bond by the petitioner took away the jurisdiction of the county commissioners, as to damages for the land taken by the respondents under its provisions.

There was no appearance for the petitioner.

BY THE COURT. On the face of the proceedings there can be no legal exception to the verdict, and the judgment of the court of common pleas must therefore be affirmed. But the respondents now propose to raise the question, whether the county commissioners had jurisdiction, in a case where the parties had agreed upon another mode of adjusting the petitioner's damages. But this was not an objection which went to the jurisdiction, but in bar of the damages, like that of accord and satisfaction, payment, or release, and should have been taken before the commissioners, as a reason for not ordering a jury. Not having been taken then, it was waived, and it is now too late to take the objection.

Judgment of the court of common pleas affirmed

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF WORCESTER, OCTOBER TERM 1849, AT WORCESTER.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE, }
HON. THERON METCALF, } JUSTICES.
HON. RICHARD FLETCHER, }

4c 152
172 293

PAUL C. CHASE *vs.* THE SUTTON MANUFACTURING COMPANY.

Where the land of an individual is taken, under the authority of the legislature, for a public use, and a full compensation is paid to the proprietor for a perpetual easement therein; and the same land is afterwards appropriated, by legislative authority, to another public use of a like kind; the owner of the land is not entitled to any further compensation.

The Blackstone Canal Company were incorporated by an act of the legislature, for an unlimited period, with authority to locate and construct a canal down the valley of the Blackstone river, from Worcester to the state line, and, for that purpose, to appropriate the ponds on or near the route of the canal as reservoirs, paying all damages occasioned by the construction of such canal or reservoirs, or by flowing resulting therefrom, to be estimated and adjusted in the manner provided in the act of incorporation, and with authority also to erect mills and other works on the waters connected with the canal: In locating the canal, they established as a reservoir and a part of the canal a pond raised by the respondents for the use of their mill by erecting a dam across the Blackstone river: The complainant, whose

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land was flowed by the dam, and who had not previously demanded or been paid any damages therefor, after such location, presented his claim for damages against the canal company, and was allowed and received a certain sum in gross, for the flowing of his land, which was declared to be perpetual: The canal company were afterwards authorized by the legislature to sell and convey their entire property, or any part of it, in the canal, for the purpose of a railroad from Worcester to Providence; such conveyance to vest a good title in the purchaser, though a change of the use of the canal to other public purposes might follow; and not to work a forfeiture of any of the vested rights of the company to the dams located to maintain a head of water, though the canal might be discontinued as a public navigable highway: The act also provided, that the dams erected in the bed of the Blackstone river might be maintained by the several mill owners, for their exclusive benefit, at the same height to which they had been raised; and that such land as should not be so sold should revert to the original owners divested of the easement: The canal company accordingly made a sale and conveyance, of all their property in the canal and its appendages in Massachusetts, to the Worcester and Providence Railroad Company, for the purposes of a railroad; reserving to themselves all the reservoirs, the dams erected on the Blackstone river, and the waters therein; and saving the right and privilege of all persons to draw or conduct water through the canal for mill purposes, irrigation, or otherwise: The Blackstone canal, — so far as the same was within this commonwealth, — from the time of such conveyance, was discontinued as a navigable canal, although portions of it remained susceptible of such use, and had been principally filled up by the railroad company, or by the original proprietors: In a complaint for the flowing of the complainant's land by the respondents' dam and pond, subsequently instituted, it was held: (1.) That the canal company, by establishing the respondents' dam and pond as a reservoir, and the latter as a section of their canal, and paying the damages therefor, acquired the same right as if they had themselves built the dam and formed the reservoir; (2.) That the canal company, having the right to erect and maintain mills, had a right to adopt the respondents' dam and pond, as well for that purpose, as for the supply of the canal with water; and having adopted the same, and given public notice thereof, the complainant's claim for damages embraced all the damages done to his land by flowing, for all the uses to which the company had a right to apply the water; (3.) That the legislature might authorize the canal company to sell the property of the canal, and to discontinue the same, retaining their corporate existence and powers, in other respects; and, (4.) That the complainant, having claimed and received of the canal company a gross sum in damages for the right of flowing his land, as a perpetual easement, for purposes of a public or *quasi* public nature, the same thereby became annexed to the mill privilege, free from all further claim for damages occasioned by such flowing.

This was a complaint against the respondents for flowing land, which came to this court by appeal from the court of common pleas, where it was submitted upon an agreed statement of facts.

The complainant is the owner of the land described in his complaint, and the same is flowed, as therein alleged, by the respondents' dam.

In 1823, the legislature of this commonwealth passed an

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act (*St.* 1822, *c.* 27) incorporating the Blackstone Canal company, without limitation of duration, for the purpose of constructing a canal from Worcester to the line of the state of Rhode Island; and, in the same year, the general assembly of Rhode Island passed an act incorporating the Blackstone Canal company, in that state, for the purpose of constructing a canal from Providence to connect with the canal authorized by the state of Massachusetts. These two canal companies, though never amalgamated, were associated in the manner mentioned in their respective charters, and in sundry acts subsequently passed in addition thereto; and canals were constructed accordingly, which were connected together at the boundary of the two states, and formed one continuous line of canal from Worcester in this state to Providence in Rhode Island.

The second section of the act above mentioned, to incorporate the Blackstone Canal company, in this state, authorized the corporation thereby established to locate, construct, and fully complete a navigable canal, with locks, tow paths, basins, wharves, dams, embankments, toll-houses, and other necessary appendages, commencing in or near the village of Worcester, and from thence down the valley of the Blackstone river, in a direction toward tide water, in such place or places, as might be deemed most convenient for said company, to the boundary line between the states of Massachusetts and Rhode Island; with further power to employ and use, as reservoirs for the purpose of supplying with water the canal, or such works as might have any portion of their waters diverted from them to supply the canal, North pond, Quinsigamond or Long pond, and Dorety pond, with such other ponds as lie upon or near the route, and also to save the flood and other waters in said ponds, and to construct artificial reservoirs for the purposes aforesaid; and to connect with the canal, by feeders, or by navigable canals, any or all such ponds and reservoirs; provided, however, that all damages, which might be occasioned to any person or persons, by any of said canals, reservoirs, or feeders, in the construction thereof, should be satisfied by the corporation, in the manner provided in the act

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The fourth section authorized the corporation to purchase and hold real estate, not exceeding the value of three hundred thousand dollars, and to erect mills and other works on the waters connected with the canal, feeders, and reservoirs.

The eighth section provided, that when the canal company should have located their canal or any part thereof, they should report the same to the court of sessions, by whom commissioners should thereupon be appointed to estimate all damages which any person or persons, whose lands should be described and mentioned in such report, might sustain. And the commissioners were required to give public and seasonable notice, in such manner as the court should direct, to all persons interested, to file their claims, either with some one of the commissioners, or with the clerk of the courts for the county of Worcester, within thirty days from the date of the notice. At the end of the term allowed for filing claims for damages, the commissioners, having previously given notice, in the manner provided in the act, to all parties interested, of the time, and of the extent of the route to be examined, were to pass over the premises, and, after hearing the parties in interest, to estimate all such damages as they should think any person would sustain by the opening of the canal, or any of its branches or feeders, through the land of such person, or by the construction of any reservoirs, embankments, tow paths, basins, wharves, or any other appendages, over and above the advantages accruing from the opening of the canal. If any person should be dissatisfied with the estimate of the commissioners, he might have his claim for damages revised and assessed by a jury, in the manner provided by law, in the case of a complaint for damages occasioned by the laying out of a highway.

By a statute subsequently passed (*St.* 1825, *c.* 144) in addition to the former act, it was provided, that the commissioners, appointed under the eighth section of that act, should be authorized to appraise all damages accruing from the flowing of land by the canal company, for their use, and also damages occasioned by the detention or diversion of any water from persons having a legal right to the same.

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In 1825, after the canal company had been incorporated, but before they had located their canal, David Wilkinson and company, who were then the owners of real estate on the bank of the Blackstone river, erected a mill thereon, together with the dam in question, which was built across the river, and the pond raised by which, known as Pleasant Falls pond, occupied and was a part of the bed of the river. The respondents subsequently became the purchasers from Wilkinson and company, and are now the owners of the mill erected by them, and of the mill privilege and dam connected therewith.

In 1828, the canal company located and established the dam erected as above mentioned by Wilkinson and company, and the pond thereby raised, as a reservoir, and made use of the pond, by the side of which they had formed a tow path, for a mile or more, as a part of the canal, and reported these locations to the court of sessions, as they were required to do by their act of incorporation.

In the same year, the complainant, not having before claimed, either against the respondents or their predecessors, or been paid, any damages for the flowing of his land occasioned by the respondents' dam, prosecuted his claim for the damages done or to be done him by the canal company, in consequence of their having flowed his land, by means of the respondents' dam and pond, before commissioners appointed for the purpose, in the manner provided by the statute, who reported, that the land around the respondents' pond, which was and would be "permanently overflowed," by keeping up the dam to its then present height, was owned in severalty, among others, by the complainant, to whom they awarded the sum of $225 "for his permanent damages," and $13·50 for damages in 1827, making in the whole $238·50 to be paid by the canal company. On an appeal from the award of the commissioners, the jury, on the hearing before them, estimated the damages which the complainant had sustained, or should sustain, by locating the respondents' pond as a reservoir for the use of the canal, including all flowing, which was to be perpetual, at the sum

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of $480; and this amount was duly paid by the canal company.

The canal company continued to use the rights, privileges and easements thus acquired, until the year 1846; and the respondents have continued to exercise the right to draw and use the water of the pond for their mill, subject to the rights and easements of the canal company, to the present time.

In the year 1844, the legislature of Massachusetts passed an act (*St.* 1844, *c.* 166) in addition to their act of incorporation, authorizing the canal company to make sale of the whole or of any portion of their property.

By the first section of this act, the canal company were authorized, in order to facilitate the construction of a railroad between Worcester and Providence, as a substitute for the canal, to make sale of their entire property, or any part or portion thereof, and to convey the same to any purchaser or purchasers; which conveyance should vest a good and sufficient title to such property, "though a change of the use to other public purposes" might follow such sale.

The second section declared, that such sale of the canal, or any part or portion of the works thereof, should not work a forfeiture of any of the vested rights of the company to the dams located to maintain a head of water, but that the right to maintain the same should continue in the company, and their assigns, the same as before, though the canal might be discontinued as a navigable highway.

The third section provided, that the dams which had been either erected or raised by the canal company in the bed of the Blackstone river, might be maintained by the several mill owners, who had an interest in the works on said dams, at the same height to which they had been raised by the company, and for the exclusive benefit of such mill owners, their heirs or assigns; that the land over which the canal had been located should not be sold and conveyed for any other than railroad purposes; and that such land as should not be sold for railroad purposes should revert to the original owners thereof, divested of the easement of the canal company.

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In pursuance of the authority conferred by this act, the canal company passed a vote to sell and convey certain portions of their property; and, on the 4th of February, 1846, made a conveyance accordingly to the Providence and Worcester Railroad company, for their use and benefit as a railroad company, and for railroad purposes, of so much of the grantors' right, title, interest and property in that part of the canal which was within the state of Massachusetts, comprising the entire body, tract, bed and bottom, or right of way thereof, with the tow paths, locks, lock-houses and other fixtures, as the railroad company, the grantees, should actually appropriate and use in the construction of their road, or for railroad purposes.

The deed provided, that so much of the canal as should not be used and appropriated in the construction of the railroad, or for railroad purposes, should remain the property of the grantors, except so far as the same might revert to the original owners of the land by operation of law; the reservoirs owned by the grantors in Massachusetts, with the land and dams belonging thereto, the waters contained therein, the dams erected or raised on the Blackstone river by the grantors, and the waters in the river retained by such dams, were expressly reserved by the grantors to themselves, without being affected in any way by the conveyance; and the deed further provided that the rights and privileges, which any person or persons had acquired or then possessed, to draw or conduct water through the canal in Massachusetts, for mill purposes, irrigation, or otherwise, should not be injured or affected by the conveyance; but that such rights and privileges should be and remain uninjured, and in full force.

The Blackstone canal in Rhode Island has never been discontinued, but is used occasionally as and for a canal.

The respondents' pond, with the tow path by the side of it, is in the same condition in which it has always been, and boats may still be towed upon it for the distance of a mile or more; but the same has never been used as a canal, since the date of the deed to the Providence and Worcester Rail-

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road company; and the canal, for the greater part of the way above and below the respondents' pond, so far as the same is in this state, has been filled up by the railroad company, or by the original owners of the land.

There are several other portions of the line of the canal in Massachusetts, where dams and feeders constituted the level of the canal, through which boats can still be towed; though the same have never been used for the purpose of navigation, by the canal company, since the year 1846; but without the respondents' pond and others in Massachusetts, the canal in Rhode Island could not be used at all seasons of the year.

The canal company have made no other conveyance of their property or rights than as above mentioned. No forfeiture of their charter has ever been judicially ascertained or declared; nor has the same been repealed; nor have they surrendered their franchise. They have never given the respondents any notice, that they were at liberty to take down their dam, if they should think proper to do so; but the canal company still claim to be the owners of all the property not conveyed by them to the railroad corporation.

It was further agreed, that the respondents and those under whom they claim had acquired no right to flow the complainant's land, without paying damages therefor, unless such a right resulted from the location of the canal, and the assessment and payment of damages therefor under the act incorporating the canal company; that, since the conveyance to the railroad company, the respondents had and the canal company had not repaired the respondents' dam; and that the canal had become nearly worthless, and not of much public benefit.

The case was argued at the October term, 1848.

B. R. Curtis, for the petitioner.

I. Is the right of the canal company to flow these lands now in existence? 1. The grant to them, in their charter, was not general, but merely for the purposes of working a navigable canal. Their only right to raise a head of water was for the use of the canal. Any right may be destroyed by an act incompatible with the nature and exercise of that

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right. *Taylor* v. *Hampton*, 4 McCord, 96, 103; *Manning* v *Smith*, 6 Conn. 289; *Pritchard* v. *Atkinson*, 4 N. H. 1; Gale & Wh. Easem. 258, 354, *et seq.*, and English cases there cited; Woolr. Ways, 15. Here the change of the use was important to the land owners. See *Biglow* v. *Battle*, 15 Mass. 313; *Strong* v. *Benedict*, 5 Conn. 210; *Saunders* v. *Newman*, 1 B. & Ald. 258; *Luttrel's Case*, 4 Co. 86. If the grant is general, the use may be changed; otherwise not. *French* v. *Braintree Man. Co.* 23 Pick. 216. The fourth section of the charter is subservient to the second, and only means that the company may use the surplus water in driving mills. The construction of this act is to be fair; not strict, but still not loose nor too liberal. 4 Kent, 298, 299; *Hooker* v. *New Haven & Northampton Co.* 15 Conn. 312; *Stourbridge Canal Co.* v. *Wheeley*, 2 B. & Ad. 792; *Chesapeake & Ohio Canal Co.* v. *Baltimore & Ohio Railroad Co.* 4 Gill & J. 1, 175. 2. By the act of 1844, *c.* 166, the existence of the canal as a navigable canal was terminated, not temporarily, but permanently, and by the act of the parties. The language of the second section of that act does not import a change of the uses of the easement, and a conferring of new rights, but only a waiver of the right of the state to a forfeiture. Besides, no provision being made for compensation, it would be unconstitutional if it conferred new rights. The analogous acts, discontinuing turnpikes and establishing highways, provide in all cases for compensation. See *St.* 1827, *c.* 77, § 14, reënacted in Rev. Sts. *c.* 39, § 17. The third section of the act of 1844 does not mean, that the mill owners shall maintain their mills without making compensation to the owners of the land flowed. The damages already paid are for the use of the land for the canal only, and were estimated accordingly.

II. The respondents cannot claim and exercise the right of flowing under the canal company. This dam was not "either erected or raised" by the canal company, within *St.* 1844, *c.* 166, § 3, but was erected many years before.

P. C. Bacon and *I. M. Barton*, for the respondents.

Shaw, C. J. This is a complaint against the respondents

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under the mill acts, (Rev. Sts. *c.* 116,) to obtain compensation for damage occasioned by flowing the land of the complainant, by a dam erected and maintained for mill purposes. The case comes before this court by appeal, upon an agreed statement of facts.

It appears by the case, that the dam complained of, now owned by the respondents, was built upon and across the bed of the Blackstone river, by Wilkinson and company, in the year 1825, under whom the respondents have derived title. Before the erection of this dam, a company had been incorporated by the legislature of Massachusetts, to establish and maintain a navigable canal, from Worcester, along the valley of the Blackstone river, and on a line towards tide water at Providence, to the line of the state of Rhode Island. A similar company was incorporated in the year 1823, by an act of the state of Rhode Island, to construct and maintain a similar canal, from the Massachusetts line to Providence, both together being intended to meet at the state line, and together to provide canal navigation from Worcester to Providence.

The dam of Wilkinson and company, now that of the respondents, was built after authority was granted to lay out the canal, but before it was located; the water thus raised, constituting the mill dam of Wilkinson and company, then flowed the same lands now owned by the complainant, and in respect to which this claim for damages is made, and to the same height to which it is now flowed.

But before proceedings were had, for the assessment of damages, in behalf of the present complainant, or at least before any such damages were assessed, the canal company in Massachusetts located their canal, as they had authority to do, over and along the mill pond, to the extent of a mile or more, constructed a towing path along the margin of the same, and established the dam and pond as a reservoir. After such location of the canal and establishment of the reservoir, namely, in the year 1828, the complainant caused his damages, done or to be done him by the canal company, occasioned by the respondents' dam, upon

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proper proceedings in the courts, according to the provisions of the act of incorporation, to be assessed, first by commissioners, and ultimately by a jury; and the damages so assessed were duly paid to him by the canal company.

The original act had provided for a compensation in damages, for those whose lands should be taken for these works; but it might be considered doubtful, whether such provision for compensation extended specifically to damage done by flowing. This doubt was removed by an act passed before these proceedings took place, (*St.* 1825, *c.* 144,) by which the commissioners were expressly authorized to appraise all damages accruing to any person by reason of flowing his land by the company, for their use. No question is made, that these damages were rightly awarded. It further appears, that no other damages have been paid to the complainant, by the respondents, or by any owner of their mill, mill dam and privilege, for damages caused by flowing by means of the same dam.

It further appears, that by virtue of authority given to the Blackstone Canal company, by the statute of 1844, *c.* 166, they have sold and conveyed to the Providence and Worcester Railroad company the land occupied by their canal, locks, toll-houses, and embankments, lying in Massachusetts, reserving, however, their reservoirs, dams, and waterworks; that since the sale, sections of the bed of the canal have been filled up, both above and below the dam in question, and that the part of the canal lying in Massachusetts has ceased to be used as a navigable canal, though the lower section thereof, lying in Rhode Island, between the Massachusetts line and tide water at Providence, is still used as a canal.

I. The complainant now claims damages on the ground, that he has been paid by the canal company only for the use of his land as a reservoir, for the purposes of supplying the canal with water, for the use of it as a navigable canal; that it is no longer necessary and no longer used for that purpose; that he has a right, as against the canal company, to have the dam of the respondents removed, and the water to flow off freely from his land; and that if the respondents want it to

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raise a head of water for their mill, they must pay him damage therefor, as if he had received no compensation from the canal company for the damage occasioned by them, although from the same cause and by means of the same dam.

If the transaction were the plain and simple one, which the argument seems to imply; if there were no identity or communion of right and interest between the mill owners and the canal company; if the company had been authorized to take and use water, and erect dams and waterworks, for the purpose only of constructing a navigable canal and keeping it in operation; if that object and purpose had been abandoned, and the actual use of the water had been discontinued by the company, without any reservation or saving of rights; — there would have been much plausibility in this argument, although the result would be to give the plaintiff a double compensation for one and the same loss.

It becomes, therefore, necessary to inquire what were the objects and purposes, and what, by law, were the powers and privileges, of the canal company; what was the connection between them and the mill owners; and by what authority, and under what circumstances, the use of the canal was discontinued, as a navigable canal.

By the act of incorporation passed on the 14th of January, 1823, (*St.* 1822, *c.* 27,) the company were incorporated, and authorized to locate, construct, and complete a navigable canal, with locks, tow paths, basins, wharves, dams, embankments, toll-houses, and other necessary appendages, commencing, &c., down the valley of the Blackstone river, with power to use and employ, as reservoirs, certain ponds named, with such other ponds as lie upon or near said route, and to construct artificial reservoirs for these purposes, with a provision for the payment of damages occasioned thereby. The fourth section, after providing for and limiting the right of the company to hold real estate, further gives them power to erect mills and other works on the waters connected with the canal, feeders and reservoirs. Several additional acts were passed, the object of which was to establish a more complete union of purposes and interests between the Rhode Island

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company and the Massachusetts company, no otherwise material to this inquiry, than as they indicate the sense of the legislature and the company, that the two together were deemed parts of one great public enterprise, not, however, abolishing the identity of either, or uniting them into one corporation. *Farnam* v. *Blackstone Canal Co.* 1 Sumn. 46.

Under the authority thus given to erect dams, tow paths, reservoirs and the like, paying damages to the owners of land used for that purpose, the canal company established the dam and mill pond in question, then newly erected, as a reservoir, and adopted it as a section of their canal, with a tow path on the side of it, for more than a mile. This they could only do, by purchase of Wilkinson and company, or by payment of damages to them, by which, and by force of the statute, they acquired a right in the dam and reservoir, in the same manner as if they had built the dam and formed the reservoir at their own charge. They paid the damage occasioned thereby, as they would have done, had it been commenced after the location. The dam was erected across the bed of the Blackstone river, and directly within the limits where the company were authorized to make and perpetually maintain a reservoir.

The complainant himself seems so to have regarded the case, by forbearing to make any claim for damage against Wilkinson and company, as mill owners and builders of the dam, and claiming gross damages, as for a perpetual easement to flow his lands, of the canal company, and receiving the full amount of such damages, as assessed by a jury.

By the fourth section of the act of incorporation, the canal company were authorized to erect mills and other works on the waters connected with the canal, feeders and reservoirs. It has been argued, that this power of erecting and maintaining mills was not a separate and independent purpose from that of erecting and maintaining a navigable canal, nor was it a separate and independent franchise conferred by the act, but only incidental to the power of raising water for the canal, and would fall with it. Perhaps, if there were no reservation in the act, by which the company were authorized to

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discontinue the navigable canal, this latter consequence would follow, and the franchise of erecting and maintaining mills alone would cease with it. But this power is alluded to now for another purpose. The dam and reservoir in question, if not absolutely necessary, were obviously well adapted to promote the principal enterprise, as a navigable canal; they would also be useful for mill purposes, when there should be water enough for both, and though merely incidental, the right to maintain a mill would clearly be within the franchise conferred on the company. This incidental right to use the water for mill purposes was, no doubt, conferred on the company as a benefit, to encourage them thus in carrying on a great public enterprise; and there was a semblance of equity in it, because it was a valuable power in the nature of property, created at their expense, and by the outlay of their capital, though in the promotion of another object. The company having this valuable privilege might either use it themselves, or sell or lease it to others, and thus make it a source of revenue, in aid of the principal purpose.

In the present case, the company having acquired this dam, and adopted it for the purpose both of making a section of the canal and also of establishing it as a reservoir, obtained with it the right to the mill power, as incidental, which they could use or dispose of, for a certain term of time or in perpetuity. If they made arrangements with the proprietors, by which the company were to pay the damages occasioned by the dam or for the cost of the dam itself, to have the use of the pond, for a section of the canal, with a tow path on its margin, and also for a reservoir, and the proprietors to have the mill power and mill privilege, these respective rights, mutually conceded, must be regarded as considerations for each other, and the mill privilege to be held in subordination to the right of the company, and no longer upon an independent title. Otherwise, the dam and reservoir could not be "established" as works erected and maintained in pursuance of the powers vested in the company by the act, and the mill owners might prostrate the dam at their pleasure. This is wholly inconsistent with the facts agreed, to wit, that

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the company did adopt the dam as theirs, paid the damages occasioned by it, and established the pond raised by it, as their reservoir, under the act.

The result of this view is, that the company had the right to maintain this dam, to raise a head of water both to supply the navigable canal and also to work mills; that they adopted this dam, then recently built, established the pond as a reservoir, and gave notice of it, according to law; so that the claim for damages on the part of any owner, whose lands were flowed by it, was a claim for all the damage occasioned by the use of the company's franchise, and of course embraced all the damage done to the complainant's land by flowing, for all the uses of the water, to which the company had a right to apply it, including as well the mill power as the supply of the canal with water. The damages, therefore, now sought to be recovered, have been paid by the canal company, under whom the respondents virtually hold their mill power.

This appears to be the ground, upon which the complainant acted at the time. If the canal company and the mill owners were wholly independent of each other; if the complainant went for and obtained damage from the canal company, for raising and using the water for supplying the canal only, and the raising of it for mills was another and different use not compensated for by those damages, — his claim against the mill owners was as good then as it is now. But he did not so consider it, and therefore made his claim against the canal company, and not against the mill owners. And in our opinion this was right. In theory of law, his claim was for damage done to his lands, by the erection of a dam for all the purposes within the franchise granted to the company, which was to raise water and use it for the supply of the canal, and for the working of mills, and of course such were the damages awarded and paid. The complainant having thus claimed and received a full compensation for a perpetual easement to flow his lands, for purposes of a public or *quasi* public nature, equity corresponds with the law in declaring him not entitled to a further compensation.

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II. But it is further argued, and perhaps this may be regarded as the main point relied upon, that the mill privileges were merely incidental to the maintenance of the canal for navigation; that the canal having been abandoned by the company, and navigation therein having become impracticable by the filling up of portions of it, the mill privileges, and all derivative and dependent rights, are gone. If the fact were true, it might be quite questionable whether the conclusion, to the extent stated, would follow. If, before such an abandonment, the company had acquired a mill privilege, as they lawfully might, and had alienated it by a valid conveyance to another, whose right would thereby become vested, it may be doubted whether even a forfeiture of its franchises by the company, by a judgment, would defeat the right of an alienee taking under such title, valid at the time it was made.

But passing over this consideration with the above remark only, we are to consider the nature of this alleged abandonment, and its legal effect. It is true, that the use of the canal, as a navigable canal, has been discontinued so far as the same was in Massachusetts, and the company have sold to the railroad corporation the bed of their canal; but this was done under an express enactment of the legislature, authorizing such sale, and declaring that it should not work a forfeiture. *St.* 1844, *c.* 166.

This act is short, but very significant and efficacious. Its avowed purpose is to facilitate the construction of a railroad between Worcester and Providence, as a substitute for the canal; it authorizes the canal company to make sale of their entire property, or any part or portion thereof, and to convey the same to any purchaser or purchasers; which conveyance shall vest a good title to such property, though a change of use to other public purposes may follow such sale.

This last provision, and indeed the whole act, was founded on a principle which has been decided in this commonwealth, and is now well settled, that where, under the authority of the legislature, in virtue of the sovereign power of eminent domain, private property has been taken for a public use,

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and a full compensation for a perpetual easement in land has been paid to the owner therefor, and afterwards the land is appropriated to a public use of a like kind, as where a turnpike has by law been converted into a common highway, no new claim for compensation can be sustained by the owner of the land over which it passes.

In pursuance of this principle, we presume, the act in question authorizes the canal company to sell the land over which the canal was located for railroad purposes only. The second section provides, that the sale of the canal, or any portion of the works thereof, shall not operate to effect a forfeiture of any of the vested rights of the company to the dams, &c., but the right to maintain the same shall continue in the company and their assigns, though the canal shall be discontinued as a navigable highway. The third section provides, that the dams, which have been erected or raised by the company in the bed of the Blackstone river, may be maintained by the several mill owners, at the same height, &c., for the exclusive benefit of such mill owners, their heirs and assigns. In literal strictness, the dam in question was not erected or raised by the canal company; but as it was adopted, the damage caused by it paid for by the company, and, as we must presume, with the consent of the owners, as it exempted them from making the same payment, it is within the spirit and equity of the act.

By authority of this act, the canal company by their deed dated the 4th of January, 1846, sold and conveyed to the Providence and Worcester Railroad company the entire body, tract, bed and bottom, or right of way in that part of the canal lying within the jurisdiction of Massachusetts, with locks, &c., for railroad purposes only, and so far as the same should be used and appropriated to railroad purposes. The deed further states, that the reservoirs owned by the grantors, with the land, dams, &c., the waters, &c., and the waters of Blackstone river retained by such dams, are expressly reserved to the canal company; also, that the right acquired by any person to draw or conduct water through the canal, for mill purposes, irrigation or otherwise, shall not

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be injured or affected by said deed, but such rights are to remain in full force.

This is the deed, made pursuant to the authority of a legislative act, which is relied upon as an abandonment by the company of their franchise, and a forfeiture of their rights. The effect of this deed undoubtedly was, to put an end to the use of the canal, as a navigable highway; but the legislature, who are competent to decide what is for the public benefit, exempted the company from the further obligation of maintaining a navigable canal, and declared that it should not work a forfeiture of their charter, or any loss of their vested rights. There has been no forfeiture, no surrender, nothing other than the discontinuance of the canal as a navigable highway, to terminate the corporate existence and the continued action of this corporation; and this statute expressly preserves all the vested rights of the company, until they shall have conveyed them away, pursuant to its provisions.

If the legislature, as guardians of the rights of the public, had full and just authority to pass this act, to authorize the incorporated company to cease to perform the public duty of maintaining a navigable canal, and yet to secure them in the enjoyment of privileges given as a compensation for the performance of such public duty, then this act was valid; and we think there can be no doubt of the authority of the legislature on this subject.

The raising of a head of water, by a dam, for the support and maintenance of mills, is regarded so far as a public object, that the legislature have long exercised the power of authorizing owners to erect mills on their own lands, although in doing so, water is necessarily thrown back on the lands of others; providing, at the same time, for the party damnified a reasonable compensation. This principle lies at the foundation of the mill acts, and renders them consistent with justice and the provision of the constitution. But these acts justifying the flowing of another's land, without his consent, can rest only on the right of eminent domain to take private

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property for public use on making a compensation, which is incident to the right of sovereignty.

The original act of incorporation could rest only on this foundation, and it had two objects in view: the one, to provide for a navigable canal, a use manifestly public; the other, to erect and maintain mills, a use long since recognized as being so far a public one, as to warrant the necessary flowing of another's land, without his consent, making provision for a reasonable compensation. It may be admitted, in the present case, that this last purpose was incidental, subordinate, and applied only to heads of water, raised for the more prominent purpose of supplying the canal. Within these limits, it was a power or privilege granted to this company to erect and maintain mills, which was a purpose *quasi* public. Looking at these two objects as within the scope of the original act, it appears to us, that it was the obvious purpose of the legislature, in the act of 1844, whilst they intended to dispense with the further use of the canal, intended at the same time to continue in force that part of the act of incorporation, which authorized the company to maintain dams, necessary to the other contemplated use, that of supporting and working mills; and that they have done so by the terms of the act, and that the rights to mill powers, in these works, remain unchanged. Whether, by force of this act, this particular dam in the bed of the Blackstone river vested in the canal company, or has come to the respondents or their assignees, is immaterial to the present inquiry; because, in either case, no new right, no new ground of claim for damages, has accrued to the complainant.

It appears, that the canal, as a navigable highway, had become nearly useless; that it yielded little or no income to the owners, who had advanced a large amount of capital for its construction; and that there was no prospect of its becoming more beneficial to the public, or more profitable to the proprietors. Under these circumstances, it appears to us, that the legislature, yielding to the obvious necessity of consenting to its abandonment, acted within the scope of their

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just and constitutional power, and with equal wisdom and justice, in leaving to a public-spirited but losing company of individuals all the remnants of property which could be preserved from the general wreck.

Property which had been purchased and paid for by the company, and which, by the failure of the main enterprise, had become unnecessary to its promotion, and which could be disposed of, by the company, without injustice to any body, was obviously of this description. Of the equity of this rule, as applied to ordinary articles of property, such as boats, materials of buildings removed, and the like, there could be no doubt. And we think that valuable mill powers, mill privileges, and reservoirs, lawfully acquired by the company, within the scope of their authority, and obtained by the outlay of their own capital, though in their nature fixed and immovable, come within the same principle; and that it was competent for the legislature to secure the benefit of them to the company, and to provide for their continued corporate existence for the preservation and management of such articles, or the sale and disposition of them, and that they have done so by the act in question.

It is scarcely necessary to add, that regarding a mill privilege as a valuable property, capable of being conveyed and disposed of, it necessarily embraces the use of the head of water raised for working the mills, and the right of flowing as incident; that when such flowing extends over the lands of another, it is an easement in such lands annexed to the privilege; and that when gross damages have been paid, by the owner of the mill to the owner of the land, for a perpetual easement, the mill privilege carries with it such easement and right of flowing, free from all further claim for damages occasioned by such flowing.

The court are of opinion, and do adjudge, that the complainant is not entitled to damages as prayed for, and that the complaint be dismissed.

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The Inhabitants of Oakham *vs.* The Inhabitants of Rutland.

A mortgagor, occupying the estate by leave of a lessee for years of the mortgagee, who has entered for condition broken, has no estate of inheritance or freehold in the premises, and cannot, by such occupation, acquire a settlement under the fourth method in the Rev. Sts. *c.* 45, § 1.

A certificate of the entry and possession of mortgaged premises by the mortgagee, for the purpose of foreclosure, is made evidence of such entry by the Rev. Sts. *c.* 107, § 2; and the effect of it cannot be avoided by proof that the mortgagee did not actually go upon the land.

This action, which was assumpsit for the support of certain paupers named in the writ, was submitted to the court upon an agreed statement of facts.

The pauper, Perley Clark, in April, 1842, purchased and took possession of an estate in Oakham, which was then subject to a mortgage from a former owner to Isaac Southgate, to secure the payment of the sum of $600. In October, 1843, Clark made a certificate* on the mortgage deed, that the mortgagee had taken quiet and peaceable possession of the estate therein mentioned, for condition broken and in order to foreclose the mortgage, but no formal entry was made on the land by the mortgagee. At the time the mortgagee took possession, as above, he offered to give Clark a lease of the premises, if he would furnish security for the rent, which was fixed at $36 a year, being the interest on the money secured by the mortgage. Clark, being unable to procure a surety for the rent, made an arrangement with his son Elam, that the latter should take the lease; that Clark, with his wife, should continue to live upon the place, and keep a cow thereon, and till as much of the land as he might

* The following is a copy of this certificate: —

"I, Perley Clark, owning and living on the within-named premises, do hereby give and grant to Isaac Southgate, the within-named mortgagee, quiet and peaceable possession of the estate described in the within mortgage deed, for *consideration* broken, and in order to foreclose the same. Witness my hand this 17th day of October, 1843. Perley Clark. Witness, Orlando Russell."

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think proper; and that the use of the estate, other than this, should belong to the son, who should pay the rent.

The mortgagee acceded to this arrangement, and gave the lease accordingly. If admissible in evidence, it would appear from the testimony of the mortgagee, that his object in making the lease was to obtain the interest due on the mortgage, annually, and to effect a foreclosure at the expiration of three years.

Perley Clark, with his wife and son Elam, continued to live upon the estate, according to the arrangement above mentioned, which was merely a verbal agreement, the father keeping his cow on the place, and cultivating a small portion of the land, until the expiration of three years from the time he purchased and began to occupy the estate. The first application of Perley Clark, for relief as a pauper, was in July, 1846.

If, in the opinion of the court, upon such of the foregoing facts as are admissible in evidence, Perley Clark acquired a settlement in Oakham by the purchase and occupation of the estate above mentioned, the plaintiffs are to become nonsuit; otherwise the defendants are to be defaulted.

This case was argued at the last October term.

B. F. Thomas, for the plaintiffs.

C. Allen, for the defendants.

Shaw, C. J. The pauper did not acquire a settlement in Oakham. To obtain a settlement in the fourth mode, the person must have an estate of inheritance or freehold, in some town, and live on the same three years successively. Here, by the entry to foreclose by the mortgagee, he taking actual possession, and afterwards receiving the rents and profits, the pauper ceased to hold the estate as a freehold. Such an entry to foreclose is considered to many purposes as an eviction, and as the commencement of a new title. *Goodwin* v. *Richardson*, 11 Mass. 469; *Ballard* v. *Carter*, 5 Pick. 112; *Tufts* v. *Adams*, 8 Pick. 547.

The mortgagee, after such entry, took the rents and profits to his own use, subject only to account for the same, in case of redemption. Some of the cases state, that a right of

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redemption is an estate of inheritance. True, to some purposes, it is; and before entry to foreclose, it has all the characteristics of a freehold. But, after an entry to foreclose, the mortgagee retaining possession and taking the rents and profits, it is not an estate of inheritance, on which the owner can live as on his freehold, and therefore not within the statute. A remainder or reversion is real estate, descendible; but we doubt whether it would be an estate within the statute, because, although the owner might *de facto* live on it, as a lodger or servant, it would not be by right, as on his own freehold. So, here, though the pauper lived on the estate, it was not in right of his freehold, but by permission of a lessee of the mortgagee. And this distinguishes the case from that of *Mount Washington* v. *Clarksburg*, 19 Pick. 294. There, though the mortgagee had obtained judgment, he had never entered; and the pauper occupied the estate, as of right, as his own freehold, not accountable to any body for rents and profits.

The certificate indorsed on the mortgage deed, signed by the mortgagor, stating that the mortgagee had entered for condition broken, duly recorded, is made evidence by the statute (Rev. Sts. *c.* 107, § 2), fixing the time of the mortgagee's entry to foreclose; and it is not competent for the defendants to avoid the effect of it, by proof, that he did not actually go upon the land. *Defendants defaulted.*

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Ruth Pratt *vs.* Moses H. Felton.

If a widow, for whom provision is made in the will of her husband, do not make her election, agreeably to the Rev. Sts. *c.* 60, § 11, to take such provision, or be endowed of his lands; such omission will be considered as conclusive evidence of her acceptance of the provision made in the will, and a waiver of her right of dower.

Where a widow, to whom real estate was devised by her husband, made a demand of dower in his estate, and, afterwards, being in possession of the estate devised to her, leased the same to a tenant, who entered and took possession of and occupied the same; it was held, that whether the terms of the statute would be complied with or not by an implied election, the facts stated were no evidence of the election required by the statute.

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Pratt v. Felton.

This was an action of dower, which the parties agreed to submit to the court, upon the following statement of facts:—

Seth Pratt, the husband of the demandant, died October 8th, 1847, leaving a will in which he devised his estate to his wife in these terms: "Firstly. I give and bequeath unto my wife, Ruth Pratt, the homestead place, containing fifteen acres, more or less, with the buildings on the same, to be and remain for her own use and control; and at her decease it is my will, that so much of it as is not necessary to be used and improved for her support to go to her own connection at her decease. I also give and bequeath to her, the said Ruth, all my personal property after all my just debts are paid. Also about five acres of land, more or less, situated near the woollen factory in Barre, I give to the said Ruth the use and improvement of the same, and at her decease to go to my own connections."

The demandant, both before and after the decease of Seth Pratt, occupied the premises devised to her; on the third of January, 1848, she made a demand to have dower assigned; and in March, 1848, leased the homestead to a tenant who was still in the possession thereof, without any objection to the occupation of the demandant or her tenant being made by the heirs of Seth Pratt. The tenant is not an heir; but derived his title to the demanded premises by a deed with warranty from Seth Pratt, executed on the 22d of April, 1836. The demandant never filed in the probate office an election to be endowed of the testator's lands.

W. A. Bryant, for the demandant.

P. C. Bacon and *W. S. Barton*, for the tenant.

Wilde, J. This is a writ of dower, in which the only question to be decided is, whether the demandant's claim is not barred by her acceptance of the provision made for her by the will of her husband in lieu of dower. The provision in the will is not expressly declared to be in lieu of dower, but this, by the Rev. Sts. *c.* 60, § 11, is not required. By that section, it is provided, that "If any provision be made for a widow in the will of her husband, she shall, within six months after the probate of the will, make her election, whether she

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will take such provision, or be endowed of his lands; but she shall not be entitled to both, unless it plainly appears, by the will, to have been the intention of the testator, that she should have such provision, in addition to her dower." No such election was made, in the present case, by the demandant; and this omission we consider as conclusive evidence of her acceptance of the provision made in the will, and a waiver of her right of dower; for by the express words of the statute, she is not entitled to both; there being nothing in the language of the will, by which it can be inferred, that the testator intended she should have the provision in addition to her dower. 1 Cruise, (Greenl. ed.) 181, note 1; *Thompson* v. *McGaw*, 1 Met. 66; *Adams* v. *Adams*, 5 Met. 277.

But it has been argued for the demandant, that although she has made no express election, yet her demand of dower was an implied election. We are of opinion, however, that the facts agreed will not warrant the implication, for soon after her demand of dower, she leased the home place which was devised to her in fee, and which the lessee still occupies. The inference from these facts is, that it was the demandant's intention to accept the provision made in the will, and to claim also her right of dower. This certainly is no evidence of an election as required by the statute. Whether any implied election would be such as the statute requires, or whether an express election should be filed in the probate office, are questions not necessary to be decided in this case; as the demandant's election cannot be inferred from the facts agreed, if an implied election would be sufficient.

Judgment for the tenant.

4c 176
153 540
4c 176
182 419

WILLIAM SIGOURNEY & another *vs.* WILLARD SEVERY.

The holder of a witnessed promissory note, payable to a person named therein or bearer, may maintain an action thereon, for his own use, in the name of the administrator of the payee, after the expiration of six years from the time when the cause of action accrued, provided the action is brought with the consent of such administrator

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This action was brought on a promissory note, of which the following is a copy:—

"Oxford, May 13th, 1828. For value received, I promise to pay Andrew Sigourney, or bearer, thirty-two dollars in thirty days, and interest till paid. Willard Severy. Attest, Benj. F. Town."

The case was submitted to the court, upon an agreed statement of facts, from which it appeared, that in the year 1832, Andrew Sigourney, the payee mentioned in the note, sold and delivered the same to Nahum Sibley, for a valuable consideration; that in 1838, Andrew Sigourney died, and the plaintiffs were appointed his administrators; that they have administered on the estate, and have settled an account purporting to be their final administration account in the probate office; that the note in suit was not on the inventory of the estate of Andrew Sigourney, and has never been his property, or belonged to his estate since the sale and transfer thereof to Sibley; and that this action was brought in the names of the administrators of Andrew Sigourney, with their consent, but without any assignment of the note to them or to the estate.

If the court should be of opinion, that the plaintiffs can maintain this suit, a default is to be entered, otherwise the plaintiffs are to become nonsuit.

C. D. Bowman, for the plaintiffs.

E. Fuller, for the defendant.

Metcalf, J. We consider the question in this case as settled by the decision in *Hodges* v. *Holland*, 19 Pick. 43. That was an action on a note made payable to the plaintiff, or order, and which he had indorsed over, for a valuable consideration, before action brought. It was there said by Mr. Justice Putnam, that the *St.* of 1786, *c.* 52, § 5, (which is like the Rev. Sts. *c.* 120, § 4, on which the present case turns,) "does not require that the action shall be brought by the promisee for his own use, or otherwise; but he may maintain the action, and recover all the money which should be due upon a litigation between the original parties. And it is of no consequence to the maker, whether the promisee shall put

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the money into his own pocket, or pay it over honestly to him to whom it has been equitably or legally transferred. And if the action is brought for the benefit of the indorsee or *bona fide* holder, without any objection on the part of the payee, it furnishes no legal or equitable defence to the maker."

Now if an action can be maintained on a note payable to A. or order, when brought in the payee's name, with his consent, for the benefit of the holder, to whom he has transferred it by indorsement, so may an action on a note payable to A. or bearer be maintained in his administrators' names, with their consent, for the benefit of the holder to whom he has transferred it by delivery. There might be a difference between the two cases, if the administrators, by consenting that such action be brought in their names, rendered the estate of their intestate liable to costs, on failure to support the action. But, by our system of law, administrators are personally liable for costs, when they bring actions in their representative capacity, which they cannot support; and they can be indemnified out of their intestate's assets, only by the allowance of the court of probate, upon their showing that such costs are a just charge upon those assets. If costs were incurred by administrators, in a suit like the present, no court of probate would allow them to be a charge upon the deceased's estate. *Judgment for the plaintiffs.*

ALPHEUS MERRIFIELD *vs.* HIRAM COBLEIGH.

4c 178
165 29
4c 178
j176 1841
j176 2343
j176 2345

Where a forfeiture of land is claimed by the grantor for breach of a condition subsequent, in the performance of which he has no interest, having parted with the estate for the accommodation of which it is created, the terms of the condition are to be construed with great strictness.

The owner of a lot of land made a deed of a small parcel thereof, with a house thereon, reserving to himself the privilege of a bridle road in front of the house, and not to be at any expense in supporting a fence around the land conveyed, and whenever the grantee, his heirs or assigns should neglect or refuse to support the fence, then the deed to be void; and subsequently conveyed the residue to one who removed the fence without replacing it and reconveyed such residue to

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the grantor, who afterwards entered upon the small parcel claiming a forfeiture thereof for breach of the condition: It was held, that the condition, if not merely personal, being designed to benefit the grantor, as owner of the residue of the lot, attached to such residue, and passed to the grantee thereof, whose removal of the fence was an extinguishment or waiver of the condition; which, being thus determined, could not be revived by the reconveyance. And the reconveyance having been in mortgage, it was held, further, that it was immaterial in this respect, whether the removal of the fence took place before or after the execution of the mortgage. It was held, also, that until reasonable notice given, or request made, and neglect or refusal of the grantee, to replace the fence, there was no neglect or refusal to support the fence, within the terms of the condition.

THIS was a real action to recover half an acre of land, with a house and buildings thereon, situated in the southerly part of the city of Worcester. The trial was in this court before the chief justice, by whom the case was reported for the consideration of the whole court.

The demandant, on the 7th of November, 1821, being then the owner of a tract of land containing between fourteen and fifteen acres, of which the demanded premises were parcel, conveyed the latter to Elizabeth Cobleigh, her heirs and assigns, by a deed containing the usual covenants, and also the following clause: "Reserving, however, to myself, the privilege of a bridle road in front of the house, and not to be at any expense in supporting a fence around said land. Whenever she, the said Elizabeth Cobleigh, or her aforesaids, shall neglect or refuse to support said fence, then this deed to be void." The granted premises were bounded on two or three sides thereof by the grantor's other land.

On the 15th of December, 1834, Elizabeth Cobleigh mortgaged the demanded premises to her son Hiram Cobleigh, the tenant, and died without having discharged the mortgage. Henry Cobleigh, son of Elizabeth, having entered on the demanded premises and resided there with his mother during her lifetime, continued to occupy the same after her death. Hiram Cobleigh, the mortgagee, brought an action against him to foreclose the mortgage, and having recovered judgment therein at the March term of the court of common pleas, 1848, took possession of the premises by virtue of a writ of possession on the 18th of April, 1848.

The demandant, in 1827, conveyed the residue of the

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original lot of fourteen acres to Martin Wilder, from whom by mesne conveyances the same came to and vested in Henry Cobleigh, on the 3d of July, 1832. On the 4th of March, 1835, Henry Cobleigh mortgaged the estate to the demandant, as security for the payment of the sum of $120, and interest.

It was in evidence, that after the conveyance by the demandant to Elizabeth Cobleigh, and after he had conveyed the residue of the original lot of fourteen acres, as above stated, between which and the demanded premises was the fence referred to in the reservation and condition contained in the deed to Elizabeth Cobleigh, namely, in the year 1833, 1834, or 1835, the fence on the north side of the demanded premises had been removed; and that no fence was or had been standing or remaining thereon, at and for some years previous to the 16th of January, 1847; on which day, the demandant, claiming that the demanded premises were forfeited by a breach of the condition in the deed to Elizabeth Cobleigh, by reason that she and her assigns had not maintained and supported a fence, and that there was none around the demanded premises, entered for such alleged breach of condition, with the consent of Henry Cobleigh, and thereupon claimed that he was seized in fee of the premises, as of his former estate, under that title; but the demandant, previous to such entry, had not made any demand upon or given any notice to Elizabeth Cobleigh, in her lifetime, or to Hiram or Henry Cobleigh, since her decease, to erect, maintain or support a fence around the demanded premises. It was conceded, that the fence in question was removed after Henry Cobleigh became the owner of the fourteen acre lot, but it was doubtful, from the evidence, whether the removal took place before or after his mortgage to the demandant.

At the same time that the demandant made an entry upon the demanded premises, claiming the same as forfeited, he also entered upon the residue of the lot of fourteen acres, with the consent of Henry Cobleigh, for condition broken y reason of the non-payment of the money due on the mortgage thereof and to foreclose the same.

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It was contended, among other grounds of defence, that the condition in the deed from the demandant to Elizabeth Cobleigh, that the grantee should maintain a fence, was made for the benefit of the grantor, in his capacity as owner in fee of the adjoining fourteen acres; that the right to enforce it vested in the grantee of that estate, and came by mesne conveyances to Henry Cobleigh; that Henry Cobleigh, after he thus became the owner of the estate, himself removed and took away without replacing the fence; and that such voluntary act of his was a waiver of the condition, which he alone then had a right to enforce.

The judge being of opinion, that the right to enforce the condition vested in Henry Cobleigh, by the demandant's conveyance and by the mesne conveyances; that his act in removing the fence was a waiver of the condition; and that it was immaterial whether such removal was before or after Henry Cobleigh's mortgage to the demandant; a verdict was taken by consent for the tenant, subject to the opinion of the whole court, upon the case to be reported.

E. B. Stoddard, for the demandant.

A grantor may annex what conditions he pleases to his grant, so they be not illegal or repugnant to the grant. 2 Cruise, (Gr. ed.) 12. This condition is valid; and the act of Henry Cobleigh could not waive, but at most, only suspend it. Shep. Touch. 129, 131; 1 Bac. Ab. Condition, L.; Com. Dig. Condition, D. 6; *Doe* v. *Pearson*, 6 East, 173; 4 Kent, 132, note; *Gray* v. *Blanchard*, 8 Pick. 284; *Doe* v. *Allen*, 3 Taunt. 78. A condition, or the benefit of a condition, can only be reserved to the grantor or his heirs, not to a stranger; for it is a maxim of law, that nothing which lies in action, entry, or reëntry can be granted over, in order to discourage maintenance. 2 Cruise, (Gr. ed.) 4. An express condition in a deed cannot be waived, or its effect destroyed, by parol, or silent acquiescence. *Jackson* v. *Crysler*, 1 Johns. Ca. 125. It is material whether the fence was removed before or after the mortgage. *Gray* v. *Blanchard*, 8 Pick. 284, 292.

W. A. Bryant, for the tenant.

A condition subsequent is to be construed strictly. 4 Kent,

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129, 132; *Catlin* v. *Springfield F. Ins. Co.* 1 Sumn. 434, 440. The grantee of the residue might waive the condition, on the ordinary principle of a waiver of what is for one's benefit; and the removal of the fence by him destroyed the condition. 2 Cruise, (Gr. ed.) 8, 28, 37, note; *Goodright* v. *Davids*, Cowp. 803, 805; 1 Hilliard, Ab. *c.* 28, § 21; *Chalker* v. *Chalker*, 1 Conn. 79; *Enfield Toll Bridge Co.* v. *Connecticut River Co.* 7 Conn. 28, 45; *Bayley* v. *Homan*, 5 Scott, 94; *Dickey* v. *Mc Cullough*, 2 W. & S. 88, 100; *Fox* v. *Phelps*, 20 Wend. 437. The case of *Gray* v. *Blanchard* neither raises nor decides the question, as to the relative times of removing the fence, and giving the mortgage. At the time of the demandant's entry, there had been no breach of the condition. See *Lyman* v. *Lull*, 4 N. H. 495. The entry was not sufficient without notice to the party adversely interested.

Shaw, C. J. This is a real action to recover land, which the demandant formerly owned, and which he conveyed by deed to one Elizabeth Cobleigh, from whom the tenant claims, subject to a condition, that the deed should be void, whenever the grantee, her heirs or assigns, should neglect or refuse to support a fence around said granted land.

It appears that the deed was made in 1821, that the grantor was then the owner of a tract of between fourteen and fifteen acres, out of which the grant of half an acre was made. It appears by the description, that the granted premises bounded on the grantor's other land, on two or three sides thereof. The condition, in connection with a reservation, is thus expressed: "Reserving, however, to myself the privilege of a bridle road in front of the house, and not to be at any expense in supporting a fence around said land. Whenever she, the said Elizabeth, or her aforesaids, shall neglect or refuse to support said fence, then this deed to be void."

Afterwards, and before the removal of the fence, Merrifield, the grantor, and present demandant, conveyed away the whole of his estate and interest in the fourteen acres, and the same came by mesne conveyances to Henry Cobleigh, the son of Elizabeth, who lived in the house standing on the granted premises, being the half acre, with his mother.

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It further appeared, that Henry Cobleigh, having thus become owner in fee of the fourteen acres, and occupying with his mother the half acre, with the house thereon, removed one of the fences mentioned in the condition, standing on the north side of the half acre, and separating it from the fourteen acres, and that the same was never replaced in the same line, and was not standing there in 1847, when the demandant entered thereon, declaring his entry to be for condition broken, by reason of the failure to keep up and maintain the fence. No demand was ever made by him on any one to replace the fence.

It further appeared, that in March, 1835, the said Henry Cobleigh mortgaged the fourteen acres to Merrifield, the demandant; but whether this was before or after he removed the fence was left doubtful on the evidence. The demandant entered to foreclose this mortgage, at the same time that he entered for breach of the condition in his own deed, on the 16th of January, 1847. The question is whether the demandant can recover the land, on the ground of such forfeiture.

The jury were instructed, that this condition in the demandant's deed to Elizabeth Cobleigh was inserted for the benefit of the grantor, as owner of the larger lot, out of which the smaller was granted; that it vested in him only so long as he remained such owner of the larger lot; that if it was not merely personal to himself, it passed to his grantees of the fourteen acres, and came by mesne conveyances to Henry Cobleigh; that if he removed the fence, he had a right to do so, and it operated as a waiver or extinguishment of the condition. They were also directed, that it was immaterial whether this fence was removed before or after his mortgage to Merrifield, because until the demandant entered for breach of the condition of his own deed, he was a mortgagee out of possession, holding the estate merely as a pledge, and because he did not profess to claim the benefit of such condition of forfeiture in his capacity as such mortgagee. If this direction was right, the verdict for the defendant must stand.

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The demandant claims a forfeiture by the breach of a condition subsequent, in the performance of which, the grantor could have no interest after he parted with the estate, for the accommodation of which it was reserved; it is therefore to be construed with great strictness.

In construing this part of a deed, as in construing every other written instrument, the court will regard the obvious intent and purpose of the parties, and so construe it as best to promote and accomplish that purpose. *Doe* v. *Bancks*, 4 B. & Ald. 401. The condition in the present case is not very technically expressed, but it seems obvious that it was designed to benefit the grantor, as the owner of the land out of which it was carved. He first reserves a bridle road, which is of no other importance here than as it expresses the same purpose, a privilege in the use of his other land; he then reserves the privilege not to be at any expense in supporting a fence around said land; he could be at no expense from this cause, either in maintaining a division fence, according to a duty imposed by law, or in fencing his own grounds for his own use, except as such proprietor of the reserved land. Then comes the condition, as follows: "Whenever the said Elizabeth Cobleigh, or her heirs or assigns, shall neglect or refuse to support said fence, this deed to be void." The words "said fence" connect the condition with the reservation, and make it manifest that the condition was inserted, to secure the privilege expressed in the reservation, to be exempt from expense in the support of such a fence. So long as he is entirely exempted from any possibility of incurring such expense, the condition is substantially kept.

If this was a condition which vested in the demandant, as owner of the land reserved, and not merely personal, it then was attached to the land, and came by mesne conveyances to Henry Cobleigh, and the removal of the fence by him, being such owner, was an extinguishment or waiver of the condition. Once rightfully waived, or extinguished, the condition was determined, and could not be revived.

But there is another view, which it appears to us is decisive. Such a condition, when relied on to work a forfeiture,

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is to be construed with great strictness; the demandant shall have his exact legal right, but no more. *Bradstreet* v. *Clark*, 21 Pick. 389. The condition in the present case is, that the estate shall be void, if the grantee, her heirs or assigns, shall "neglect" or "refuse" to support the fence.

Both these terms, in connection with the subject matter, imply some previous demand, notice, or request, if the fence has decayed or been removed, to replace it, and that the defendant had either "refused" in terms to do the act required, or "neglected," that is, after notice or request, and after a reasonable time allowed for that purpose, had failed to do it. In the present case, it appears that no such demand or request was made, or notice given. There was therefore no breach of condition, which defeated the estate, at the time of the entry of the demandant, and this action cannot be maintained.

The Inhabitants of Westborough *vs.* The Inhabitants of Rehoboth.

The third section of *St.* 1811, *c.* 133, for dividing the town of Rehoboth, and establishing the town of Seekonk, which provided that one half of the paupers, for which the town of Rehoboth was chargeable, including such as had removed therefrom, if lawfully returned there for support, should be delivered over to the overseers of the poor of the new town, to be there supported, did not change the general law (*St.* 1793, *c.* 34, § 2; Rev. Sts. *c.* 48, § 2, *cl.* 10) relating to the settlement of the inhabitants of a town, on a division thereof, as to the settlement of the paupers referred to in such act.

This was an action of assumpsit for the support of Benjamin B. Pettis, a pauper, whose settlement was alleged to be in the town of Rehoboth. The trial was before *Hopkinson*, J., in the court of common pleas. It being admitted, that the expenses sued for had been incurred by the plaintiffs, as alleged by them, and that the defendants had received due notice, it was contended, on the part of the plaintiffs, that the pauper derived his settlement through his father, Ira Pettis, from James Pettis, his grandfather, whose settlement was in Rehoboth.

To establish the settlement of James Pettis, the plaintiffs

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offered evidence of his residence in Rehoboth from 1768 to 1799; of the publication of intentions of marriage between him and Mary Streeter, on the 8th of October, 1768; of the births of children of James and Mary Pettis, in the record of births in the town of Rehoboth, at different times from 1769 to 1795, and among others that of Ira Pettis, the father of the pauper, on the 17th of May, 1795; that James Pettis, after the year 1799 (but the precise time when did not appear), removed to the town of Hopkinton, in the county of Middlesex, where he resided until the year 1819; that during his residence in Hopkinton, he at different times received relief as a pauper from the defendants; that in the year 1819, James Pettis and his wife were removed, at the expense of the defendants, to Rehoboth, and there supported as paupers until their death, three or four years afterwards; and that in the year 1820, Ira Pettis, the son of James and father of the pauper, received aid from the town of Hopkinton, as a pauper, and that the expense so incurred was repaid by the defendants.

The defendants introduced as a witness the town clerk of Rehoboth, who stated that there were records of that town from 1643, but that for some years there were no assessors' lists to be found, and that he had examined the books of the town, to see if James Pettis had been assessed. The plaintiffs objected to any testimony of the witness as to the contents of the books; but the court permitted him to testify, that he had made such examination and found no such assessment.

The defendants also introduced Peter Wheaton, who testified that he was born in 1768, in the then town of Rehoboth; that his birth took place and he had ever since resided upon that part of the town which was afterwards incorporated as Seekonk; that he had known James Pettis from his (witness's) boyhood to 1799; that during all this time, James Pettis resided in that part of Rehoboth, which afterwards became Seekonk; and that he (the witness) could recollect things which occurred when he was ten years old.

The town of Seekonk was incorporated by the act of

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1811, *c.* 133, passed on the 12th of February, 1812, the third section of which provided, that all the expenses arising for the support of the poor of Rehoboth, with which it was then chargeable, together with such poor as had removed out of Rehoboth prior to the act, but who might thereafter be lawfully returned to said town for support, should be equally divided between Seekonk and Rehoboth; and that when the town of Seekonk should be organized, the paupers, whether supported in whole or in part only, should be divided as nearly as might be, and one half of the number delivered over to the overseers of the poor of that town, to be by them in future supported.

The court instructed the jury, upon this evidence, that if they believed the facts stated by Wheaton, as to the residence of James Pettis, they would not be warranted in finding that the settlement of the pauper was in the town of Rehoboth; and the jury having returned their verdict accordingly for the defendants, the plaintiffs alleged exceptions.

B. F. Thomas, for the plaintiffs.

N. Morton, for the defendants, relied on *West Boylston* v. *Boylston*, 15 Mass. 261; *Brewster* v. *Harwich*, 4 Mass. 278, 281; *Windham* v. *Portland*, 4 Mass. 384; *Hanson* v. *Pembroke*, 16 Pick. 197; *Lexington* v. *Burlington*, 19 Pick. 426; *Princeton* v. *West Boylston*, 15 Mass. 257.

Metcalf, J. The facts to which the law is to be applied in this case must be taken to be as follows: James Pettis, the grandfather of the pauper for whose support the plaintiffs seek to charge the defendants, had a legal settlement in Rehoboth, in 1812, when that town was divided, and a part of it incorporated into a new town, called Seekonk. He removed from Rehoboth in 1799, when his son Ira, the father of the pauper, was only four years old; and his last dwelling-place was in that part of Rehoboth which is now Seekonk. Neither the grandfather nor father of the pauper ever acquired a settlement in any other town, and of course the settlement of the pauper is the same as theirs, until he acquires a new one; which he has not yet done.

What is the law, on these facts? By *St.* 1793, *c.* 34, § 2,

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(reënacted in the Rev. Sts. c. 45, § 1, cl. 10,) "upon the division of towns, or districts, every person having a legal settlement therein, but being removed therefrom at the time of such division, and not having gained a legal settlement elsewhere, shall have his legal settlement in that town or district wherein his last dwelling-place or home shall happen to fall upon such division." By this provision, the settlement of the pauper's grandfather and father was transferred to Seekonk, upon the division of the town of Rehoboth. So of the settlement of the pauper, if he was born before the division. If he was not born till afterwards, then, by virtue of another provision in St. 1793, c. 34, § 2, he follows and has the settlement of his father.

It was argued for the plaintiffs, that by the act incorporating Seekonk, (St. 1811, c. 133, § 3,) the provisions of the general law are so changed as to fix the pauper's settlement in Rehoboth. But we are clearly of opinion, both on principle and on the authorities cited by the defendants' counsel, that the general law must be applied to this case.

Exceptions overruled.

THE PRESIDENT, DIRECTORS & COMPANY OF THE OXFORD BANK *vs.* LARNED DAVIS.

The indorser of a bill of exchange, for the accommodation of the drawer, payable in six months from date, is liable as indorser upon non-payment and notice, although the bill is not presented for acceptance, and protested for non-acceptance, and notice thereof given to the indorser, until five months after its date.

THIS was an action, brought by a writ dated May 5th, 1848, on a bill of exchange drawn by Lyman P. Low, of Oxford, on Farnum, Newhall and company, of Philadelphia, for $1500, dated September 4th, 1847, payable to the order of Larned Davis, the defendant, in six months from date, and indorsed by him and delivered to the plaintiffs. The case was submitted to the court upon the following agreed statement of facts: —

The bill was indorsed by the defendant, for the accommo-

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dation of Low; was discounted by the plaintiffs on the 4th of September, 1847; was sent to the Suffolk bank at Boston (the plaintiff's agents) for acceptance and collection in Philadelphia; and was kept by the Suffolk bank for about five months, being mislaid, without being presented to the drawee for acceptance, or any notice of the non-acceptance given to the defendant.

In November, 1847, Low went into insolvency in this state, after Farnum, Newhall and company had accepted and paid other paper for him, some of which was indorsed by the defendant, and passed through the Oxford and Suffolk banks, while the bill in question was so mislaid. The latter was presented in Philadelphia, on the 16th of February, 1848, for acceptance, protested for non-acceptance, and notice thereof given. A few days afterwards the Suffolk bank directed notice of the non-acceptance to be given to the defendant. It is a general custom, where banks receive bills as above stated, to forward them immediately for acceptance.

The plaintiffs, since the presentment for acceptance and protest for non-acceptance, have proved the bill as a claim against the estate of Low, the drawer. The defendant had no notice, until after the expiration of the five months during which the bill was mislaid, that it had not been immediately presented and accepted.

The bill was also presented to Farnum, Newhall and company, on the 7th of March, 1848, for payment, and payment thereof was refused. It was then protested for non-payment, and notice given to the defendant.

C. D. Bowman, for the plaintiffs, cited Bayley on Bills, (Phil. & Sew. ed. 1836,) 212; Molloy, B. 2, *c.* 10, § 16; Beawes, § 266, p. 453; Chit. Bills, (1st ed.) 76; *O'Keefe* v. *Dunn*, 6 Taunt. 305; *Blesard* v. *Hirst*, 5 Burr. 2670; *Goodall* v. *Dolley*, 1 T. R. 712; *Bachelor* v. *Priest*, 12 Pick. 399, 406; *Fall River Union Bank* v. *Willard*, 5 Met. 216, 220; *Lenox* v. *Leverett*, 10 Mass. 1, 5, Rand's note; *Lenox* v. *Cook*, 8 Mass. 460.

I. M. Barton and *P. C. Bacon*, for the defendant, referred to 1 U. S. Dig. 426, and 1 U. S. Dig. Sup. 290, 293.

By the court. The plaintiffs are entitled to judgment

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The Inhabitants of Fitchburg *vs.* The Inhabitants of Winchendon.

Whether a person removing from one town to another intends to change his residence, is a question of fact, and not of law.

In an action brought by one town against another for the support of a pauper and his family, evidence that the pauper left his former home and came to the defendant town with the intention of removing his family there as soon as practicable, that he boarded and worked there for ten years, and paid taxes there five years of the ten, and that a year after he came, his family removed there, and continued to reside with him for the rest of the ten years, when they all removed to the plaintiff town, is sufficient to warrant the jury in finding that the pauper had gained a settlement for himself and family in the defendant town.

This action, which was tried before *Hopkinson*, J., in the court of common pleas, was brought to recover the sum of $42·68, for the support of Lemuel Sanders and his family, as paupers, having their legal settlement in the town of Winchendon. The defendants admitted, that all the preliminary steps requisite to charge them with the support of the paupers had been taken by the plaintiffs, and that they were liable accordingly, provided the paupers had their legal settlement in Winchendon, which was the only question in the case.

The plaintiffs contended, that the paupers had acquired a legal settlement in Winchendon, in the twelfth mode pointed out in the Rev. Sts. *c.* 45, § 1, by a residence of ten years, and the assessment and payment of taxes five years during that period, in the town of Winchendon; and the defendants admitted, that Sanders was assessed and paid a poll tax in Winchendon, as of the 1st of May, 1832, and in each year thereafter, until the year 1840.

To prove the ten years' residence of Sanders in Winchendon, he was called as a witness by the plaintiffs, and testified in substance as follows: That he was born in Rutland, in the county of Worcester, was forty-nine years of age, and was married in 1819; that in 1830, he lived in Oakham, with his wife, and then had four children; that he then worked in the Barre factory, until about the last of June, 1831, when he went to Winchendon to work for J. D. Dunbar, building and

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setting up machinery; that he lived there until the 26th of October, 1842, and then removed to Fitchburg, where he had ever since resided; that it was his intention to remove to Winchendon, though he did not know that any thing was said to Dunbar about his removal, and nothing was said about the remaining or removal of his family; that while employed in the Barre factory, he was at work for Dunbar, who wanted him to go to Winchendon; that he then thought, if he liked and Dunbar liked, he should remove there; that in March or April, 1832, while at Winchendon, soon after Dunbar removed there (who had not lived there before) the witness received a letter from one Babbitt, requesting him to come back and work for one Clark in Barre factory; that he then had some conversation with Dunbar about removing to Winchendon, and told him that they wanted him (the witness) back to the Barre factory; that he told Dunbar if he was going to work there (in Winchendon) any longer, he wanted to be getting his family up; that Dunbar thought he had better stay, and that if he had a mind to stay, and would stay and do as well as he had done, he should have the first chance there was for a tenement, of which there were none then to be had, but they were going to build some; that he thereupon determined to stay in Winchendon, and sent word to Babbitt to that effect, and did stay; that at the time of this conversation, he had been and was boarding and continued to board at the factory boarding-house in Winchendon, where he had his washing and most of his mending done, some of the bad mending being done at Oakham, where his family continued to reside; that his wife and children came to Winchendon to reside on the 6th of November, 1832, being carried there and their goods removed by one Nickerson, who was employed for that purpose by William Dunbar, an uncle of J. D. Dunbar; that the reason why they did not come to Winchendon sooner was because there was no tenement then ready for the witness to remove into; that the last time he went to his family at Oakham was about a month before their removal; that being sent by Dunbar for some castings at South Brookfield, he went home in his way

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there and staid over night; that he used to go in this way of errands for Dunbar to South Brookfield, and on his way visit his family; that if he had no errands that way he hired a horse and carriage and went home to see his family (the distance being about twenty-three miles), which happened as often, perhaps, as once in three or four weeks; that after his conversation with Dunbar, he never expected to go back to live in Oakham, but that if Dunbar did not keep him, he should go somewhere else, to Stafford rather than to Barre, though he had no thoughts of leaving; that he was assessed in Winchendon, and paid a tax there in 1832; that during this time he did not think any thing about where his home was, though, in answer to any proper question, he should probably have spoken of Oakham as his home; that he was then at work in Winchendon, liable to be turned away at any time, and having no lease of a house at Oakham, he was liable to be turned out by his landlord at any time; that the assessors of Winchendon did not, to his knowledge, come to see him, except once in 1840, or 1841; that during the whole time while he worked in Winchendon, before his family came there, he worked by the day, and did not make or ask Dunbar to make any contract; that before Dunbar removed to Winchendon, he carried on the factory at Barre, and the witness went back and worked there for him about two weeks, during which time he spent the nights with his family; that once when he was sick, he thought in 1831, he went home and staid a week; that in 1831 or 1832, he could not tell which, but he supposed in 1832, he was taxed in Oakham; that he refused to pay the tax, when called upon by the collector, giving as a reason, that he had already paid a tax in Winchendon; and, that he was never again called upon, and had never paid the tax assessed upon him in Oakham.

The plaintiffs here rested the case, and the presiding judge being of opinion that the evidence was not sufficient to authorize the jury to find a verdict for the plaintiffs, a verdict was thereupon rendered for the defendants, and the plaintiffs alleged exceptions.

N. Wood, for the plaintiffs, referred to *Lyman* v. *Fiske*, 17

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Pick. 231; *Opinion of the Justices*, 5 Met. 587; *Bruce* v. *Bruce*, 2 B. & P. 229, note; *Harvard College* v. *Gore*, 5 Pick. 370; *Guier* v. *O'Daniel*, 1 Binn. 349, note; *Westbrook* v. *Bowdoinham*, 7 Greenl. 363; *Richmond* v. *Vassalboro'*, 5 Greenl. 396; *Hallowell* v. *Saco*, 5 Greenl. 143; *Raymond* v. *Harrison*, 2 Fairf. 190; *Greene* v. *Windham*, 1 Shep. 225; *Cambridge* v. *Charlestown*, 13 Mass. 501; *Athol* v. *New Salem*, 7 Pick. 42.

B. F. Thomas, for the defendants, referred to *Kilburn* v. *Bennett*, 3 Met. 199; *De Bonneval* v. *De Bonneval*, 1 Curt. Ec. 856; *Munroe* v. *Douglas*, 5 Mad. 379; Story, Confl. § 46; *Opinion of the Justices*, 7 Greenl. 497, 501; *Williams* v. *Whiting*, 11 Mass. 424; *Jennison* v. *Hapgood*, 10 Pick. 77; *Waterborough* v. *Newfield*, 8 Greenl. 203; *Greene* v. *Windham*, 1 Shep. 225; *Shattuck* v. *Maynard*, 3 N H. 123; *Rumney* v. *Campton*, 10 N. H. 567.

Fletcher, J. This is an action of assumpsit to recover for supplies furnished by the town of Fitchburg for the support of Lemuel Sanders and his family, as paupers, having their legal settlement in the town of Winchendon.

The plaintiffs alleged that Sanders and his family had acquired a settlement in Winchendon under the twelfth mode specified in the Rev. Sts. *c.* 45, § 1, by a residence of ten years in succession and the payment of taxes for five years during that time in Winchendon.

After the evidence for the plaintiffs was put in, the judge ruled that it would not warrant the jury in finding a verdict for the plaintiffs. Whereupon a verdict was taken for the defendants. To this ruling the plaintiffs except. If, therefore, there was evidence which would have warranted the jury in finding a verdict for the plaintiffs, the ruling of the court below was erroneous, and a new trial must be granted.

The question of settlement is one, which, for the most part, must be determined by the facts and circumstances of each particular case; though there are some general principles of law applicable to the subject, which may be applied by the court to the facts of particular cases as found by the jury. In the present case, the question, whether or not the

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paupers had a settlement in Winchendon, depended upon the fact of Lemuel Sanders's actual residence in that town, and the intention with which he resided there, the situation of his family, his employment and other circumstances, which were peculiarly within the province of the jury.

There was evidence that he was at work in Winchendon from June, 1831, to October, 1842, being a period of more than ten years; that he was assessed and paid taxes five years of those ten; and, further, that he had left his former home not intending to return to it again. These are the leading and material facts, which may or may not make out a settlement in Winchendon, according to the intention of the pauper, and the particular circumstances in which he was placed. There was also evidence tending to show that Lemuel Sanders went to Winchendon with the intention of fixing his residence and having his settlement there, and to remove his family there as soon as practicable. The intention, which formed a most essential element in the case, was a matter to be inquired of and settled exclusively by the jury. What was the intention of the pauper was a most material fact, and not a question of law, and could only be settled by the jury, and not by the court.

The other facts in the case were such as would well warrant the jury in finding that the pauper was settled in Winchendon, if satisfied that he went to that town and resided there with the intention of making that his home and place of residence for an indefinite period, and without any intention to return to his former place of residence, or to make any other place his home.

The case, therefore, being one which was peculiarly and eminently for the jury, the ruling of the judge was erroneous, and the verdict must be set aside and a new trial granted.

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Joseph Heath *vs.* Charles Randall.

4c 196
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4c 195
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Where goods are sold and delivered under an agreement that until paid for they shall remain the property of the seller, who shall have the right in the mean time to take them away whenever he pleases, the seller has an implied irrevocable license to enter upon the buyer's land and take the goods, without a previous demand, at any time before the whole of the price is paid.

This was an action of trespass, for breaking and entering the plaintiff's close, and taking and carrying away a yoke of oxen, the property of the plaintiff. The defendant specified in defence that he was the owner of the oxen, and had a right to enter the plaintiff's premises and take them. The case was tried before *Hopkinson*, J., in the court of common pleas.

The plaintiff proved the entry by the defendant upon the close described in the declaration, which was a pasture belonging to the plaintiff, and the taking of the oxen therefrom, while thus in the plaintiff's possession.

The defendant called a witness, who testified, that in September, 1846, at which time the defendant owned the oxen, he was called to witness a contract between the parties. The plaintiff said that he had bought the defendant's oxen, and was to pay him $75 for them; $10, in a few days, and the residue as soon as he could get the money; that the cattle were to remain the defendant's until paid for; and that the defendant had a right to take them away any day (until paid for) even if it were the next day. The oxen were then delivered by the defendant to the plaintiff. No demand was ever made for the oxen, but after the sale, and before they were taken by the defendant, the plaintiff paid $25 towards them.

The judge instructed the jury, that if the contract of sale between the parties was as stated by the witness, the defendant had a right to take the oxen without any previous demand of the purchase money, and that the defendant had a right to go upon the plaintiff's land to take them.

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The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

W. A. Bryant, for the plaintiff, contended, that the vendor had no right, after part payment, to retake the property without a previous demand; *Fairbank* v. *Phelps*, 22 Pick. 535 *Ayer* v. *Bartlett*, 9 Pick. 156; *Wheeler* v. *Train*, 3 Pick. 255; *Reed* v. *Upton*, 10 Pick. 522; and was therefore a trespasser. 2 Gr. Ev. § 622; *Guille* v. *Swan*, 19 Johns. 381; *Heermance* v. *Vernoy*, 6 Johns. 5.

N. Wood, for the defendant.

Shaw, C. J. We think the direction of the court below was right. The sale of the oxen was a conditional one, and the condition was precedent, so that no property passed by such sale to the vendee, until performance. It seems that such a conditional sale, though accompanied with an actual delivery for a special purpose, will not vest the property, so that it may be attached by a creditor of the vendee. *Barrett* v. *Pritchard*, 2 Pick. 512; *Reed* v. *Upton*, 10 Pick. 522. But however that may be, the court are of opinion, that such a condition is valid, as between the parties, and no right can be set up by the vendee against the vendor. Then the delivery of the oxen to the plaintiff was made in pursuance of an agreement, that, until paid for, the defendant should have a right to take them away at any time; indeed, in the absence of any agreement to the contrary, the defendant would have had that right, under the maxim, that the right of possession follows the right of property. The plaintiff, recognizing this right, and putting the oxen into his own close, thereby gave the defendant an implied and irrevocable license to enter such close, in order to take them. *Wood* v. *Manley*, 11 Ad. & El. 34.

The entry of the defendant, therefore, into the plaintiff's premises, under such implied license, was no breach of his close, and no trespass. *Exceptions overruled.*

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Horace Park *vs.* Daniel Darling.

The purchaser of goods at a sale on execution acquires a valid title thereby, provided it appears by the return that the sale was conducted according to law, although the judgment and previous proceedings are irregular.

Where a justice of the peace made an entry of a civil action upon his memorandum book, and of the proceedings therein, as follows: "1842, Dec. 3. *Daniel Darling* v. *Horace Park*. Entered and defaulted, and judgment for plaintiff for damages, 9·69, cost, 3·11 — 12·80," and issued execution accordingly; but neither the writ nor the evidence of the plaintiff's demand was then filed in the case, or in the possession of the justice; it was held, that if these papers were before the justice, when the execution was issued, the proceedings were not irregular; and that upon being subsequently produced before him and verified, he would thereupon be authorized to make a record of the judgment at large.

This was an action of trover for a mare, and was tried before *Hopkinson*, J., in the court of common pleas. The defence specified was a seizure by an officer, and a sale on execution against the plaintiff.

The plaintiff proved a taking by the defendant; also a demand by him, and a refusal by the defendant, to deliver up the mare; that the defendant took the mare to a public auction, and there exposed her for sale; and that he became the purchaser himself, and subsequently made use of her.

The defendant then proved that the auction sale was by a constable, and produced a justice's execution, in favor of the defendant, against the plaintiff, upon which was the constable's return of a seizure and sale of the mare. The plaintiff contended that the defendant should also show a judgment upon which the execution issued. But the presiding judge ruled that this was not necessary. The plaintiff then, in order to impeach the judgment, called the justice, who issued the execution, and who produced all the record or papers relating thereto in his possession, namely, an entry upon his memorandum book as follows: "1842, Dec. 3. *Daniel Darling* vs. *Horace Park*. Entered and defaulted, and judgment for plaintiff, for damage, 9·69, cost, 3·11 — 12·80." The defendant then produced a writ, returnable on the day of the alleged judgment, and duly served, together with a note and account corresponding to the

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amount of the debt in the judgment, and a bill of costs also corresponding to the amount of costs in the execution. The plaintiff objected to the admissibility or sufficiency of these papers to prove any record or judgment; but the presiding judge ruled that they were admissible, and that the question should be left to the jury, whether or not they were the original papers and record on which the execution issued. He instructed the jury, that if they were satisfied, that these were the original papers upon which the execution issued, and that they underwent the inspection of the justice when he issued the execution, and he made up the judgment from them, or the judgment being made up, he examined and passed upon it, then they constituted a sufficient record to be now put in form. The plaintiff made no objection, on the ground that the judgment had not been written out at length.

Before going to the jury, the presiding judge ruled, that the plaintiff should elect and designate which act of those proved he should regard as the conversion alleged, whether the original taking, or the sale on the execution, or the demand or refusal, or the using of the mare, and after exception taken to this ruling, the plaintiff upon such order did elect. The jury found a verdict for the defendant, and the plaintiff thereupon filed exceptions.

W. A. Bryant, for the plaintiff.

B. F. Thomas, for the defendant.

Wilde, J. This was an action of trover for a mare, alleged to be the property of the plaintiff, but which had been purchased by the defendant at a public auction, and the question is, whether this was a valid purchase, so as to vest the property in the defendant.

It was proved, that the auction sale was by a constable, on a justice's execution in favor of the defendant against the plaintiff, and that the seizure and sale of the mare were returned on the execution by the constable. No objection was made to the sufficiency of the return, but the plaintiff contended that the defendant was bound to show a judgment upon which the execution issued. But the court ruled, and we think rightly, that this was not necessary. A pur-

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chaser of goods and chattels at an officer's sale on execution acquires thereby a valid title to the property, if the officer's return shows a compliance with the law in the sale, although the judgment and previous proceedings were irregular. *Howe* v. *Starkweather*, 17 Mass. 239, 243.

But it does not appear that there was any material irregularity or error in the proceedings. There was an entry in the justice's memorandum book of the time of the entry of the action, of the defendant's default, and of the judgment for the plaintiff for damages and costs as stated in the execution. The writ, which was returnable on the day of the judgment, had not been filed with the justice, but was produced at the trial, and appeared to have been duly served; and there were produced also a note and account corresponding to the debt in the judgment, and a bill of costs also corresponding to the amount thereof in the execution. These papers being verified, the justice would unquestionably be authorized to make a regular record of the judgment at large, as the evidence sufficiently proved the regularity of the proceedings.

It was objected by the plaintiff's counsel, that he ought not to have been compelled to make the election stated in the bill of exceptions; but this objection is immaterial, for the case does not depend on the question of the alleged conversion of the property, but on the question of property.

Exceptions overruled

BENJAMIN WALKER *vs.* THE INHABITANTS OF SOUTHBRIDGE.

In an action against a town, by one of the inhabitants thereof, to recover for the support of a pauper from April 5th, 1846, to April 5th, 1847, it appeared, that the pauper had been previously kept by the plaintiff, under a contract with the town, which had terminated on the 5th of April, 1846; that on the 28th of March, 1846, the overseers of the poor of the town, of whom the plaintiff was one, made an arrangement for the support of the pauper with another person, who, on the said 6th of April, accompanied by two of the overseers appointed a committee for the purpose, went to the plaintiff's house, where the pauper then was, in order to

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remove him to his own house; that, in consequence of some negotiation between the plaintiff and such other person, relative to the support of the pauper, but which did not terminate in a contract, the pauper was suffered to remain in the plaintiff's house, and was supported there by him; it was held, that in order to entitle the plaintiff to recover, it was necessary that he should have given the notice required by statute (Rev. Sts. c. 46, § 18), and that it was not enough that the overseers had reasonable notice, by their having heard that the pauper had not been removed from the plaintiff's, but had remained with and been supported by him.

In this case, which was tried before *Hopkinson*, J., in the court of common pleas, and argued in this court, upon exceptions to the rulings of the judge in the court below, by *W. A. Bryant*, for the defendant, and *N. Wood*, for the plaintiff, the facts are sufficiently stated in the opinion of the court.

Fletcher, J. This is an action of assumpsit, in which the plaintiff seeks to recover of the defendants a certain amount for the support of William Simpson, a pauper, from April 5th, 1846, to April 5th, 1847.

The plaintiff and his brother David had kept the pauper from some time in 1845 to April, 1846, by contract with the defendants. In April, 1846, the contract between the town and the plaintiff wholly ceased. For a year subsequent to April, 1846, the overseers of the poor of the town of Southbridge made an arrangement with one Jackson for the support of the pauper. This arrangement with Jackson was made by a bidding at auction, a mode of proceeding for providing for the poor very common, and extensively practised in this commonwealth; but whether a humane and commendable mode of proceeding or not, is not material to the decision of this case. The plaintiff was one of the overseers, and of course a party to the arrangement with Jackson, for the support of the poor person in question.

On the 6th of April, the day after the contract with the plaintiff was terminated, two of the overseers with Jackson went to the house of the plaintiff, for the purpose of delivering the pauper to Jackson, who went with a carriage to take him away. After an appraisal by the overseers of the apparel of the pauper, for the purpose of transferring him to Jackson,

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the two overseers went away, leaving Jackson there; and some attempts were then made, by the plaintiff and his brother David, to negotiate with Jackson in regard to their keeping the pauper, who was the uncle of the wife of David Walker. In fact, however, no bargain was concluded, though in consequence of the negotiation, the pauper was not taken away by Jackson, but continued with the plaintiff, who now claims payment for his support.

Two of the overseers testified, that, soon after the 6th of April, they heard that the pauper remained with the plaintiff, but supposed it was by arrangement between Jackson and the plaintiff; and that they had no knowledge that the plaintiff claimed pay for his support until the end of six months, when he demanded an order for two quarters' pay.

At the trial, it was objected by the defendants, that the plaintiff had given no notice as required by the statute, and could not therefore maintain this action. Upon this point, the judge, who presided at the trial, instructed the jury, that the plaintiff need not give any formal notice to the overseers, who were bound to inquire, if they heard that Simpson had not been removed, and that if the overseers were reasonably so notified, the town would be liable. To this instruction, exception was taken.

Upon this instruction, the jury were left to find, that as the overseers, shortly after the time when Jackson took measures to remove the pauper, heard that he had not been removed, that was reasonable notice; though the overseers testified, that they supposed he remained with the plaintiff, in pursuance of some arrangement between the plaintiff and Jackson. It is manifest, from the facts in the case, that if they had not so supposed, they would have seen to his removal. The contract between the plaintiff and the town having entirely ceased to have any effect, the plaintiff, to maintain his action, must bring himself within the provisions of the statute.

The liability of the town is one imposed wholly by statute, and the right of the plaintiff to recover depends equally upon

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the statute; and the plaintiff, to make out his case, must show a compliance with the statute provision. By the Rev. Sts. *c.* 46, § 18, it is enacted, that every town shall be held to pay any expense, which shall be necessarily incurred, for the relief of a pauper, by any person who is not liable by law for his support, after notice and request made to the overseers of said town, and until provision shall be made by them.

By this provision, the town is rendered liable for the support of a poor person only after notice and request; not only notice but request, importing a distinct call on the town. The fact that the plaintiff was an overseer is immaterial as to the question of notice, since he cannot act both in his private and official capacity, so as to represent both parties at the same time.

This provision for notice to the town is of great importance, deeply affecting the interests of towns, and is one to which every person claiming upon the town should be required to give full and complete effect. The terms used in the statute, *notice* and *request*, clearly import that a party, to hold a town responsible for support furnished to any person, should be required to give express and formal and particular notice to, and make a distinct request of, the town.

It would alarmingly enhance the burdens and responsibilities of towns, if they were to be held liable to any person who might furnish aid to any one in need, without any other notice than some accidental information, or floating report, which might happen to reach the overseers, and without any request.

The statute surely does not require the overseers to make inquiry, or to go in pursuit of any reports which may casually reach them. But, on the contrary, it requires that the town shall have notice and request; which clearly must mean formal and express notice and request. The impropriety of holding a town responsible upon any other than formal and direct notice and request, is strikingly illustrated by this very case. The only evidence of notice in this case was, that the overseers had heard that the pauper remained with the

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plaintiff shortly after the time for his removal. But the overseers testified, that they supposed the pauper remained with the plaintiff by some arrangement between him and Jackson, and had no idea that the plaintiff would make a claim on the town for his support. The facts surely well warranted them in this conclusion. They had gone to the plaintiff's house with Jackson for the express purpose of his removal, and left Jackson there in negotiation with the plaintiff. Surely it cannot be, that this is such notice as was intended by the statute, or as the essential interests and safety of the town require.

Yet, upon this evidence, and this alone, under the instruction of the court, the jury found a verdict against the town. In truth, there was nothing which could be called notice, much less request, on the part of the plaintiff. The overseers were evidently entirely misled. The instruction to the jury, under the circumstances of this case, that the plaintiff need not give any formal notice to the overseers, who were bound to inquire, if they heard Simpson was not removed, was erroneous, and, for that cause, a new trial must be granted.

Exceptions sustained, verdict set aside, and a new trial ordered in the court of common pleas.

Benjamin Felton *vs.* Francis A. Brooks.

The owner of an estate insured by a mutual fire insurance company mortgaged the estate, and, at the same time, with the assent of the insurers, transferred the policy of insurance to the mortgagee by an assignment, which was absolute in terms and expressed to be for a valuable consideration, but intended only as a security for the mortgage debt; and the mortgagee afterwards assigned the mortgage, and the debt thereby secured, together with the policy of insurance, by an absolute assignment, assented to by the insurers, and for a valuable consideration, paid by the assignee. The debt secured by the mortgage having been subsequently paid in full to the assignee, by an assignee of the mortgagor, and the mortgage thereupon discharged; and the assignee of the mortgagee, after the expiration of the policy, having received the return premium thereon; it was held, that although such assignee might receive the same as attorney of the mortgagor, he could not retain it against the mortgagor, to whom he was liable therefor in an action of assumpsit.

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This was an action of assumpsit, to recover the sum of $24·30, received by the defendant's testator, Aaron Brooks, of the Worcester Mutual Fire Insurance Company, as a return of premium on a policy of insurance which had previously been assigned to him by an assignee of the plaintiff. The case was submitted to the court upon an agreed statement of facts.

The plaintiff, having insured his house and other buildings at the office of the company above mentioned for the term of seven years from the 1st of September, 1835, by a policy bearing date August 28th, 1835, mortgaged the premises to one Daniel Bacon, and on the same 28th day of August, with the assent of the insurance company, transferred the policy of insurance to him, by an assignment indorsed on the policy in the following form: "For value received of Daniel Bacon I hereby transfer and assign to him the policy of insurance within written, with all the privileges and benefits secured to me thereby." This assignment, though absolute in its terms, was intended only as security for the debt due to Bacon on his mortgage.

On the 8th of July, 1836, Bacon, the mortgagee, sold and assigned the mortgage and debt thereby secured to the defendant's testator; and, at the same time, and as a part of the same transaction, transferred the policy to him, by an assignment similar in form to the assignment from the plaintiff to him. The consideration of the assignment from Bacon to Brooks, paid by the latter, was the amount of the mortgage debt. The assignee was not informed that any one besides Bacon had any interest in the policy of insurance; nor did he promise to account to any one therefor, unless the law implies such a promise from the facts stated.

On the 20th of September, 1842, the policy having expired, Brooks, the testator, received of the insurance company the sum of $24·30, as a return of premium thereon. The plaintiff, on the 1st of January, 1843, made a demand on the testator for the money thus received by him. The testator refused to pay the same, denying the plaintiff's right thereto, and saying that he must look to Bacon for it.

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On the 18th of February, 1836, the plaintiff conveyed his estate to Abel Rice, subject to the mortgage above mentioned, and took a bond from Rice to discharge the mortgage debt. No transfer of any right under the policy was made by the plaintiff to Rice, unless such was the effect of this conveyance. Rice paid the debt, and the mortgage was discharged. No claim has been made by him to the money in controversy.

By the 10th article of the by-laws of the insurance company, it is provided, that "The alienation in any way of any property insured by this company shall *ipso facto* make void the policy, unless notice of the alienation is given to the secretary, and an assignment made of the policy to the new owner of the property within sixty days after the alienation."

The 12th article provides, that "Any person selling his building may surrender his policy, and receive back his deposit note, but the premium shall not be returned until the policy expires, when the same rate shall be repaid as on other policies expiring at that time."

W. A. Bryant, for the plaintiff.

F. A. Brooks, for himself, submitted an argument in writing.

Shaw, C. J. The determination of this case, it appears to us, depends on a few plain principles of law. The plaintiff, owning an insurable estate, obtained a policy against fire, at a mutual office, and according to its rules paid a premium, and gave a deposit, which would be returnable to him, if not required to pay losses to others, at the determination of the risk. He subsequently made a mortgage to Bacon of the same estate, and for further security assigned the policy to him. Bacon afterwards assigned the mortgage to Brooks, and at the same time assigned the policy, with the assent of the insurance company, to Brooks. The mortgage debt was subsequently paid in full to Brooks, by Rice, in pursuance of a contract made with Rice by the plaintiff for that purpose. The plaintiff sold the estate to Rice, without transferring to him any interest in the policy, under an agreement that he, Rice, would pay off the outstanding mortgage.

From this view of the facts, it is quite clear, that both the

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mortgage and the policy were collateral securities for the debt, first to Bacon, and afterwards to Brooks. The plaintiff was debtor to Brooks, on his note; this was the principal· the mortgage and policy were collateral securities to him, from the plaintiff, through the assignment of Bacon. Suppose such collateral securities consist in goods, or negotiable notes; they are held in trust, first, to apply any fruits or proceeds of them towards the payment of the debt; and secondly, if the debt is paid in full from other funds, to restore the property, or any fruits or proceeds thereof, which may have been received, to the pledgor. In the present case, Brooks received the whole of his mortgage debt of Rice, from a fund provided by the plaintiff, and the rights of the plaintiff are the same as if he had paid the whole of the mortgage debt of the plaintiff in money. The conclusion seems inevitable, that the money received by Brooks on the policy, as a return of the premium, was received by him to the use of the plaintiff; and not having applied it, or had occasion to apply it, to the payment of the plaintiff's debt, he is bound in good conscience to pay it to the plaintiff; and the law implies a promise to do so; and this is a sufficient privity in law.

It appears, from the facts agreed and a comparison of dates, that the sum received by Brooks was received after he had been paid his mortgage debt in full; it is clear, therefore, that he received it on a security which ought to have been surrendered to the plaintiff, and, of course, to his use. But if he had received it before, his failure to apply it towards the mortgage debt, and receiving the whole from Rice, who, as between him and the plaintiff, was bound to pay the whole as part of his purchase money, is ample proof that Brooks held the return premium to the plaintiff's use, and had no right, as he insisted, to take it to his own use.

The case has been elaborately argued for the defendant; but we think the argument proceeds on the unwarranted assumption, that Brooks took the policy under an absolute transfer to his own use, when the whole transaction shows that he took it collateral to the plaintiff's debt, and the plaintiff's relations to it were manifest upon the documents themselves

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The other ground, that by the transfer to Rice, the policy became void, is, we think, equally fallacious. The fallacy is shown by the conduct of Brooks himself, who, long after the alienation by the sale to Rice, went to the office, and, by force of the policy and his assignment, received the return premium, which is the subject of this suit, which clearly he could not do, if the policy was void.

It may be that after the alienation of the estate to Rice, without a transfer of the policy to him, the policy was so far void, that no person had any longer an insurable interest in the premises, and therefore no loss could be recovered in case of fire. But the same by-laws which provide (Art. 10), that in such case the policy shall be void, provide also (Art. 12), that any person selling his building may surrender his policy, and receive back his deposit note; but that the premium shall not be returned until the policy expires, when the same rate shall be repaid, as upon other policies expiring at the same time. In this case, the policy was made for seven years from the 1st of September, 1835, and expired on the 1st of September, 1842; and within that month, Brooks demanded and received the return premium in question, showing that neither party considered the policy void in the sense now insisted on. No interest in the policy passed to Rice by the conveyance of the land; the right to a return of the premium was a personal right, remaining with the plaintiff, after he had parted with the estate, depending upon the contract of the company with him; and though the assignment to Brooks gave him a sufficient power to receive the return premium as the plaintiff's attorney, having obtained payment of his mortgage, he received it to the use of the beneficial owner. *Judgment for the plaintiff.*

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Leonard Rice *vs.* Simeon Burt.

The concealment of property by an insolvent debtor from his assignee, and the concealment from a creditor of fraudulent acts, which, if known, would enable such creditor to avoid the debtor's discharge, do not constitute a fraudulent concealment of such creditor's cause of action, within the Rev. Sts. *c.* 120, § 21, so as to take the case out of the operation of the statute of limitations.

This action was brought to recover the amount of an account annexed to the writ, consisting wholly of items of debt, the last of which bore date February 1st, 1839. The writ bore date the 15th of February, 1847. The case was tried in this court before *Shaw*, C. J., by whom it was reserved and reported for the consideration of the whole court.

The defendant specified in defence and relied on the statute of limitations as a bar. He also relied on a discharge in insolvency. The plaintiff replied to the defence of the statute of limitations, that the defendant had fraudulently neglected and refused to deliver up to his assignee a large portion of his estate and effects, and fraudulently concealed the same, and that the plaintiff had no knowledge of and no means of discovering such fraud until a period within six years before the commencement of the suit.

At the trial, it appeared that voluntary proceedings in insolvency were commenced by the defendant, the first publication of notice of which was made on the 12th of June, 1839; that the defendant obtained his discharge on the 10th of August, 1839; and that the plaintiff proved the claims now in suit against the estate of the defendant, and received dividends thereon.

The plaintiff then proposed to avoid the operation of the defendant's discharge, by proving a fraudulent concealment of property from the assignee and other acts, which, by force of the provisions of the statutes on this subject, would render the discharge void; unless the judge should be of opinion, that the statute of limitations was a sufficient bar, and could not be avoided on the ground above taken by the plaintiff; in which case, the inquiry proposed by the plaintiff would become immaterial.

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And the judge being of opinion, that the concealment of property by the defendant from his assignee, and the concealment from the plaintiff of such fraudulent acts, as, if known, would enable the plaintiff to invalidate and avoid the defendant's discharge, until within six years next before the commencement of the suit, if proved, would not be such a fraudulent concealment of the cause of action from the knowledge of the plaintiff, as to take the case out of the operation of the statute of limitations; a nonsuit was entered by consent, subject to the opinion of the whole court.

B. F. Thomas, for the plaintiff.

The cause of action is not the thing sued for, but "the right to prosecute a debt or demand with effect." *Douglas* v. *Forrest*, 4 Bing. 686, 704. *St.* 1838, *c.* 163, § 7, discharges the remedy; the defendant's discharge, being fraudulent and void, concealed from the plaintiff the cause of action, within the meaning of the statute of limitations. *First Massachusetts Turnp. Corp.* v. *Field*, 3 Mass. 201; *Homer* v. *Fish*, 1 Pick. 435; *Welles* v. *Fish*, 3 Pick. 74; *Bree* v. *Holbech*, Doug. 655; *Farnam* v. *Brooks*, 9 Pick. 212; Angell on Lim. (2d. ed.) 188–195; *Sherwood* v. *Sutton*, 5 Mason, 143. By analogy to the case of absence from the commonwealth (Rev. Sts. *c.* 120, § 9), we may deduct the time of the concealment.

F. H. Dewey, for the defendant.

Metcalf, J. The question is, whether the evidence offered by the plaintiff would take the case out of the operation of the statute of limitations. By § 12 of that statute, (Rev. Sts. *c.* 120,) if any one who is liable to an action, "shall fraudulently conceal the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within six years after the person, who is entitled to bring the same, shall discover that he has such cause of action."

What is the cause of action, in the present case? Clearly it is the defendant's breach of the promise to pay the debt which the plaintiff alleges that the defendant owes him, according to the account annexed to the writ. And this

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cause of action the defendant has never concealed. But he now sets up a discharge, under the insolvent law, from his liability to pay damages for this breach of promise. In answer to this defence, the plaintiff alleges, that the defendant committed a fraud in obtaining his discharge, and concealed that fraud till within six years next before this action was brought. And we are asked to decide that the concealment, by the defendant, of matter which the plaintiff must prove, in order to rebut and control the defendant's defence, is a concealment of the plaintiff's cause of action. This we cannot do.

In *First Massachusetts Turnpike Corporation* v. *Field*, 3 Mass. 201, cited for the plaintiff, the cause of action, as in the case at bar, was a breach of promise. The promise was to build and complete a road, in a faithful manner. The defendant built it defectively, and concealed the defect; thereby concealing the cause of action. That case, therefore, is no authority for the support of this action. If the plaintiff should bring an action against the defendant for fraudulently concealing his effects, *per quod* the plaintiff was prevented from recovering his claim, after the defendant's discharge, then the case above cited would be in point, so far as respects the statute of limitations. In saying this, however, we do not mean to intimate that such an action could be maintained.

Nonsuit to stand.

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Ira P. Bacon *vs.* Rufus S. Lincoln.

It is a breach of the covenant of seizin, if there is no such land in existence as the deed purports to convey.

In declaring on a covenant, the breach may be assigned generally, by negativing the words of the covenant; and, therefore, in an action on the covenant of seizin, where the breach is that there is no such land in existence as the deed purports to convey, it is not necessary to aver that fact in the declaration.

This was an action of covenant broken, in which the plaintiff alleged a breach of the covenants of seizin and of right to convey, contained in a deed of conveyance of cer-

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tain land in the state of New York. The land conveyed was described in the deed in the following terms: "A tract of land, situate in the county of Hamilton, and state of New York, and known upon a map of township No. 38, Hamilton county, New York, and filed in the office of the clerk of the county of Montgomery, as No. 5, bounded north by great lot No. 6, east by lot No. 6, west by lot No. 4, and south by lot No. 26, containing two hundred and eight acres, meaning to convey only my right in and to the above premises, if any I have, as the same may have been sold for taxes."

At the trial, which was before *Hopkinson*, J., in the court of common pleas, the plaintiff offered evidence to show that no such map as that referred to in the deed was or ever had been filed in the office of the clerk of Montgomery county, or in the clerks' offices of Hamilton and Fulton counties, which had been set off from Montgomery; that township No. 38, mentioned in the deed, had never been surveyed or subdivided; and that no such lot as that described in the plaintiff's deed existed. The presiding judge thereupon ruled, that if no such lot No. 5 existed as a distinct part of the township, or if the deed was void for uncertainty of description, then the plaintiff could not maintain an action upon the covenants of seizin and right to convey; there being no land for the covenants to attach to.

A verdict being rendered for the defendant, under this ruling, the plaintiff excepted.

The declaration being made a part of the case by the bill of exceptions, the defendant objected, in this court, that the breach of covenant therein alleged was not well assigned, inasmuch as it was not averred that there was no such lot as that described in the deed.

W. A. Bryant (with whom was *L. Williams*), for the plaintiff, referred to *Slater* v. *Rawson*, 1 Met. 450, 456; *Marston* v. *Hobbs*, 2 Mass. 433; and *Wheelock* v. *Thayer*, 16 Pick. 68.

P. C. Bacon, for the defendant, to show that assumpsit,

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and not covenant, was the proper remedy, cited *D' Utriecht* v. *Melchor*, 1 Dall. 428, and *Wilson* v. *Jordan*, 3 Stew. & Port. 92.

WILDE, J. This is an action to recover damages for a breach of the covenant of seizin contained in the deed of the defendant, by which he conveyed, or the deed purported to convey, to the plaintiff, a certain tract of land, situate in the county of Hamilton, state of New York, and known as No. 5, on a map of township No. 38, in said county, filed in the office of the clerk of Montgomery county in said state.

At the trial, the plaintiff offered evidence to prove, that the township had never been divided into lots; and it was thereupon ruled by the court, that if no such lot existed as that described in the deed to the plaintiff, this action upon the covenant of seizin could not be maintained.

This ruling, in our opinion, is not well founded; for the defendant covenanted that he was seized of the lot described in the deed, and if no such lot existed, that amounted to a breach of the covenant.

It has been objected, that the breach of the covenant is not well assigned, and that the declaration should have averred that there was no such lot as that described in the deed; but we think such an averment is not required by the rules of pleading. The general rule is, that breaches of covenant may be assigned generally, by negativing the words of the covenant; and this rule is applicable to the breach of the covenant of seizin; *Marston* v. *Hobbs*, 2 Mass. 433, 437; and there is no necessity of a special assignment. The covenant that the defendant was seized of the lot described in the deed implies that there was such a lot.

Exceptions sustained.

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Daniel Mansfield *vs.* Polly Corbin.

The comments of a judge upon evidence are not matter of exception.
Exceptions adjudged frivolous, and double costs allowed against the party excepting.

This was an action to recover the amount due on a promissory note and on an account annexed. The defendant filed in set-off an account larger in amount than the account annexed to the writ; and specified in defence to the note, that the signature was not genuine, but a forgery, that the note was without consideration, and that it had been paid. Evidence having been introduced on both sides, except as to the specification of payment, of which the plaintiff gave no evidence, the jury were charged and retired to consider of their verdict. After having been in consultation for some time, they came into court and inquired if they could find that a part of the note was due and not the whole. The presiding judge, in answer to this inquiry, said, (without any objection being interposed on the part of the plaintiff,) that he knew of no evidence in the case, which would show that the note was not binding in part, that would not show that it was wholly void. The jury then retired and brought in their verdict for the defendant, and the plaintiff excepted.

B. D. Hyde, for the plaintiff, said that the exception was founded in the principle, that the functions of the jury should not be encroached upon by the court.

C. D. Bowman, for the defendant, was stopped by the court.

By the court. The exceptions must be overruled. The answer of the judge, to the inquiry of the jury, does nothing more than comment on the evidence, and this is no ground of exception.

Double costs for the defendant were moved for and allowed on a subsequent day.

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SAMUEL S. BROWN *vs.* JOHN W. FOSTER & Trustees.

Where an order, not negotiable, drawn by a debtor, without consideration, in favor of his minor daughter, for money to become payable to him from a third party, and accepted by the latter, is afterwards indorsed by the daughter, at the father's request and for good consideration received by him, but without the knowledge of the third party, to another person, these facts constitute no such assignment, as will enable him to hold the money against other creditors of the debtor.

FLETCHER, J. Ackley and Brown, the persons summoned as trustees, disclosed certain credits of the principal debtor in their hands. These credits were claimed by Alpheus Heywood as having been assigned to him by Foster, the debtor. On being summoned, Heywood came in to support his claim. and an issue was joined.

The material facts appear to be as follows:—

Three minor sons of the debtor were in the employment of Ackley and Brown, the trustees, who paid their wages to Daniel Heywood, for supplies furnished by him to the debtor. The debtor drew an order for the wages of these sons, which might become due, on the trustees. The order was in favor of the debtor's minor daughter, and was without any consideration and not negotiable. This order was presented to the trustees and accepted by them. The trustees notified Daniel Heywood that they should not pay him for any supplies he might after that time furnish the debtor. But to get credit of Heywood, the debtor agreed that he should have this order, and that the amount due on it should go to him. But the trustees were no parties to this arrangement and never assented to it. Daniel Heywood sold out to Alpheus, who furnished the debtor with goods, and the order was delivered by Daniel to him.

The question is, whether these facts show an assignment of what was due by the trustees to the principal debtor to Alpheus Heywood, so that he can hold the amount against the attaching creditor. A mere intention or agreement, on the part of the debtor, that Heywood should have this amount, will not constitute a transfer as against attaching creditors. There was no assignment made, or attempted to be made,

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except by the order. The trustee was never requested by the debtor to pay to Heywood, nor did he assent to do so. The debtor agreed with Daniel Heywood that he should have the proceeds of the order. But the trustees never assented to this, nor were they notified of it; on the contrary, the trustees notified Heywood that they should not pay him for any thing furnished to the debtor. The only claim made by Heywood on the trustees was on the order and for payment of the order, which was not negotiable, and which the trustees refused to pay to Heywood.

The question, therefore, is, whether the order will hold the amount in the hands of the trustees against an attaching creditor. The order not being negotiable must stand on the rights of the original payee. The case shows that the order was without any consideration, and therefore void as against creditors. The ruling was therefore correct. The exceptions are overruled, and judgment for costs against Alpheus Heywood.

N. Wood and *J. Stevens*, for the trustees and assignee.

W. A. Bryant, for the plaintiff.

SAMUEL WESTCOTT *vs.* HENRY NIMS & another.

In an action to recover the price of goods sold, the buyer may show, in reduction of damages, that the goods were not of the quantity or quality alleged.

THIS was an action of assumpsit to recover the balance of an account, amounting to $42·50, and was tried before *Hopkinson*, J., in the court of common pleas.

It appeared, that the plaintiff was a brewer in the city of Albany; that from August 12th, 1844, to August 25th, 1846 he had furnished the defendants, doing business in Worcester, on their written orders, with ale to the amount of $2470·63, at the price of good ale; and that the prices charged were the agreed prices, provided the ale were delivered sound and uninjured. It also appeared, that the defendants had made

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payments to the amount of $2430·64, and it was for the balance, with interest, that this action was brought.

The defendants filed an account in set-off, in which, in addition to their payments, they claimed the sum of $90·24, the amount of certain charges for loss on the ale by its bursting or souring; and it appeared, that there was a custom among dealers in ale, that ale should be at the risk of the seller while on its passage, and that all losses by bursting or souring during that time should fall on the seller. It did not appear, that any notice was ever given to the plaintiff of the alleged losses.

The defendants offered evidence tending to show a custom among dealers in ale, for the buyer, in the case supposed, to charge such losses to the seller in general account; and also evidence to prove the nature and amount of the losses charged in the present case. But they contended, further, that if they failed to establish the custom to charge for losses, the evidence as to the nature and amount of the losses was nevertheless competent to go to the jury to show, that the ale sold was so injured or inferior as not to be worth the sum charged for it, or that it was not of the quantity or quality alleged to have been sold to the defendants.

The presiding judge instructed the jury, that if they should not find such a custom, — no notice to the plaintiff of loss or damage being proved, — the defendants could not introduce evidence of the partial loss or deterioration of the ale; and that all such evidence must, in that event, be disregarded by them.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

E. B. Stoddard, for the defendants, cited Story on Sales, § 405; *Fielder* v. *Starkin*, 1 H. Bl. 17; *Poulton* v. *Lattimore*, 9 B. & C. 259; *Clark* v. *Baker*, 5 Met. 452; *Harrington* v. *Stratton*, 22 Pick. 510; *Miner* v. *Bradley*, 22 Pick. 457, 460; 3 Stark. Ev. 1210, 1239, and cases cited.

F. H. Dewey, for the plaintiff, cited *Fisher* v. *Samuda*, 1 Camp. 190; *Hopkins* v. *Appleby*, 1 Stark. R. 477; *Percival* v. *Blake*, 2 Car. & P. 514; *Cash* v. *Giles*, 3 Car. & P. 407;

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Sprague v. *Blake*, 20 Wend. 61; *Howard* v. *Hoey*, 23 Wend. 350; *Hart* v. *Wright*, 17 Wend. 267; *Reed* v. *Prentiss*, 1 N. H. 174; Chit. Con. 398; 3 Kent, 480.

BY THE COURT. According to the well-established law of this commonwealth, the evidence, which was ruled to be inadmissible, was admissible, and ought to have been passed upon by the jury, independently of the alleged custom.

New trial granted.

IRA P. BACON *vs.* HENRY M. TOWNE & others.

An action for maliciously prosecuting the plaintiff by indictment cannot be maintained, unless it be alleged in the declaration and proved, that the plaintiff has been fully acquitted of the charge in the indictment; and a discharge therefrom by the entry of a *nolle prosequi* is not sufficient; but the plaintiff is not bound to prove that he was acquitted by the jury promptly, without hesitation, delay, or deliberation.

In an action for malicious prosecution, the judgment of the magistrate, by whom the plaintiff was bound over for trial, on a complaint which the magistrate had no jurisdiction to try, if admissible at all as evidence of probable cause, is *prima facie* evidence only, and not conclusive.

The judgment of the magistrate, by whom the plaintiff in an action for malicious prosecution has been bound over, to answer to a criminal charge, if relied upon as evidence of probable cause, cannot be controlled or impeached by evidence that he acted unfairly and improperly in the examination.

In an action for a malicious prosecution of the plaintiff before a magistrate, it is not incumbent upon him, in proof of want of probable cause, to give in evidence all the evidence introduced before the magistrate, in order that the court may determine whether there was or was not probable cause.

If, in an action for a malicious prosecution, in instituting proceedings before a magistrate, against the plaintiff, on a criminal charge, upon which the plaintiff was bound over and subsequently indicted, it appear that the indictment has been withdrawn by a *nolle prosequi*, on account of a formal defect therein, and that a second indictment has been returned upon the same evidence, for the same or a substantive part of the same charge, the original complaint and the proceedings thereon must be considered as the actual cause of the second indictment.

Probable cause for instituting a prosecution is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person accused is guilty.

The defendant, in an action for a malicious prosecution, may prove by the magistrate, before whom the prosecution was instituted, what the testimony before him was on the part of the government, in order to show probable cause and rebut the allegation of malice; and it is not necessary, for this purpose, that the witnesses by whom the testimony was given, or their depositions, should be produced; but, if produced, and the witnesses or deponents are unable to recollect what their

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testimony was, it may nevertheless be proved by the magistrate. So, for the same purpose, the defendant may prove, that a certain person communicated to another, with a request that the latter would make it known to the defendant, the fact that the former saw the plaintiff do the criminal act of which he was accused, and that this information was communicated to the defendant, before the complaint against the plaintiff was made.

It seems, that in an action for malicious prosecution, evidence of the general bad reputation of the plaintiff is admissible, to rebut the proof of want of probable cause, and also in mitigation of damages.

Since the abolition of special pleading, the defendant in an action for malicious prosecution may give evidence of facts tending to prove the plaintiff guilty of the criminal charge imputed to him, both in proof of probable cause, and in mitigation of damages; although he is not prepared with evidence to show, that these facts were known to him at the time of the complaint against the plaintiff.

Where, in the trial of an action for the malicious prosecution of the plaintiff, on a charge of burning his own building, for the purpose of defrauding the insurers thereon, the judge instructed the jury, in reference to the question of probable cause, that the evidence tended to prove three propositions, namely: 1. An intent or motive in the plaintiff to commit the crime; 2. Guilty conduct, or acts, or knowledge of the plaintiff; 3. That the fire was the act of an incendiary; and that any two of these propositions, if proved, would constitute probable cause, but that neither alone would be sufficient: It was held, that this direction was not correct in matter of law; but that the evidence to prove the prominent facts should have been distinctly laid before the jury, with specific instructions as to what leading facts, or classes of facts, in evidence, if proved, would or would not constitute reasonable or probable cause, leaving the facts and the inferences to be drawn from them to be found by the jury.

This was an action on the case for a malicious prosecution, tried before *Hopkinson*, J., in the court of common pleas. The writ bears date August 14th, 1847, and contains four counts. The defendants, Henry M. Towne, Joshua Shaw, and Marcus Randall,* are charged therein with having maliciously and without reasonable or probable cause instituted a complaint against the plaintiff, before Mark Doolittle, esquire, a justice of the peace for the county of Hampshire, on the 7th day of November, 1846, for burning the plaintiff's factory in Belchertown, with intent to defraud the insurers, the Washington Insurance Company of Providence, who had insured certain sums upon the factory and the stock and the machinery therein; and also with burning a grist mill in Belchertown belonging to Towne, the defendant, and one Ferry. It then sets forth, that Doolittle, after examination, had bound over the plaintiff to appear at the next court of common pleas

* This defendant had been acquitted on a former trial.

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at Northampton to answer to said complaint; that an indictment was found against him at that court containing two counts, one for burning his factory with intent to defraud the insurers, and one for burning the grist mill of Town and Ferry; that the indictment was continued to the next term of the court, when a *nolle prosequi* was entered on the indictment, and a second indictment was found, on which the plaintiff was tried and acquitted by the verdict of a jury. The second indictment did not contain any count for the burning of the grist mill. The record and proceedings before the magistrate were only set forth in the first count. In the first and fourth counts it was averred, that the plaintiff was discharged from the prosecution against him, by the entry of a *nolle prosequi* on the indictment. These two counts alone made any reference to the charge of burning the grist mill. The defendants pleaded jointly the general issue, with notice that if the plaintiff made out any case, they would prove that they acted without malice, and had probable cause.

The plaintiff, to maintain the issue on his part, offered in evidence copies of the complaint and record of the magistrate. The defendants objected, that, as the record of the proceedings before the justice showed that he found there was probable cause, and that he bound over the plaintiff to answer to the complaint, this was a bar to the action; and that the plaintiff ought not to be permitted to show there was not probable cause; but the judge ruled that this was only evidence of probable cause, and that the plaintiff might be permitted to introduce the record of the court of common pleas to show an acquittal, &c.; and that he might show by any other proper and competent evidence that there was not probable cause. The defendants objected to the admission of this record of the proceedings before the justice, under any count but the first, in which it was set forth, but it was admitted generally.

The defendants then insisted, that the plaintiff ought to be required to produce all the testimony given before the magistrate on the part of the prosecution, if not that given by the plaintiff, if he desired to control or impeach the finding of the

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magistrate, to the end that the court might be enabled to determine, whether there was or was not probable cause for the prosecution; but the presiding judge ruled, that it was not necessary for the plaintiff to show what the evidence was which was given before the magistrate; and the plaintiff gave no evidence as to what witnesses were examined, or what testimony was given before Doolittle.

The plaintiff then offered in evidence copies of the indictments and record of the court of common pleas referred to in the plaintiff's writ; to the admission of which the defendants objected, first, on the ground that as the magistrate had found probable cause, that finding could not be controlled; and, secondly, because the evidence did not prove an acquittal upon the prosecution commenced before Doolittle, as the first indictment was disposed of by a *nolle prosequi*, which in its legal effect was not an acquittal; it not being such a final determination of the prosecution, that another prosecution could not be commenced. The presiding judge ruled, that the record of the first indictment, for the reason stated, did not prove an acquittal, and it was not admitted. This ruling precluded the plaintiff from recovering on the first and fourth counts. The record of the second indictment was admitted for both purposes. It was contended by the defendants, that the second indictment was an independent prosecution, and not a continuation of the prosecution commenced before Doolittle.

The plaintiff then offered to show by Edward Clarke, esquire, in order to control or impeach the finding of the justice, which was ruled to be *prima facie* evidence of probable cause, that the magistrate acted unfairly and conducted himself improperly in the examination; that he was the counsel of the complainant, and had entered into some agreement or understanding with the prosecutor, in advance, to bind the plaintiff over; and that he manifested prejudice and partiality upon the hearing before him in this, that he had first associated with him the said Clarke as a magistrate, and said Clarke had sat in the cause and hearing; and that on consultation after the hearing, it appearing that said Clarke's

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opinion differed from Doolittle's, and was for an acquittal of the plaintiff, said Doolittle then denied having so associated said Clarke with him, and decided the cause alone. To the admission of this evidence the defendants objected, but the presiding judge ruled otherwise, and Clarke was admitted to testify to facts, which, it was contended, had a tendency to make out these points, and to weaken or destroy the force of Doolittle's decision. But the jury were instructed that they were not to take any opinion of Clarke's as the judgment of a magistrate in the case, or as having any weight against that of Doolittle; that the record was conclusive as to who sat in the cause; and that the effect of the evidence was only to show the bias of the magistrate.

After the plaintiff had once rested his case, it was objected, that he had given no evidence as to the defendants' agency in the finding or procuring of the second indictment; whereupon the plaintiff offered the district attorney, William Porter, esquire, as a witness, to show that the defendants were instrumental in getting up the second indictment against the plaintiff, in June, after the first had been disposed of as before stated; but from his testimony it appeared, that the defendants not only did not take any active part in getting it up in the way of giving testimony or procuring witnesses, but that they did not even know of the finding of the second indictment till after it was found; the same having been found by the grand jury upon the former evidence, at the suggestion of the district attorney, and without any consultation or communication with the defendants. The *nolle prosequi* appeared to have been entered upon the first indictment on account of a mistake in the name of the insurance company. He also testified, that the omission, in the second indictment, of the count found in the first indictment, charging the plaintiff with burning the grist mill of Towne and Ferry, was his own act, and was without the knowledge or consent of the defendants.

There was no other evidence in the case as to the agency of the defendants in getting up the second indictment; and

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the defendants' counsel objected, that inasmuch as there was no evidence to the point, and inasmuch as the second indictment was a prosecution wholly independent of the one commenced before Doolittle, the defendants could not be held responsible for that indictment in which no notice was taken of the burning of the grist mill in which Towne was interested; but the presiding judge ruled, that the second indictment must be considered, upon the facts stated by the district attorney, as the consequence of the original complaint and of the first indictment; and that if the jury should be of opinion, that the defendants originated the complaint of their own malice and without any reasonable or probable cause, they were in law responsible for all that followed, and for the second as well as for the first indictment; the district attorney having rightly procured the second to be found, in consequence of the original wrongful act of the defendants.

There was no evidence offered on either side, as to whether the jury did or did not take time to deliberate or consider of their verdict when they retired; and it was contended by the defendants, as matter of law, that the plaintiff was bound to prove affirmatively that the jury did not deliberate, pause or hesitate in coming to the verdict which they rendered; but the presiding judge ruled and instructed the jury, that it was not necessary for the plaintiff to offer any proof touching this point.

There was no evidence as to whether Shaw gave any material testimony before the magistrate, and Towne was not a witness before him, though the complaint was made and sworn to by him.

The plaintiff then gave evidence tending to show express malice on the part of the defendants, and evidence tending to show, as he contended, that the defendants knew or had cause to believe that the plaintiff was innocent, and that they suborned or attempted to suborn witnesses to give evidence against the plaintiff.

The defendants then opened their defence, and, in order to make out probable cause and to rebut the plaintiff's evidence as to malice and want of probable cause, offered to show by

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Mark Doolittle, esquire, the justice before whom the examination was had, what the whole testimony was which was given on the part of the government; but the presiding judge ruled that this could be shown only by the same witnesses themselves produced upon the stand, or their depositions, excepting, however, what the defendants or their wives swore to, as to which Doolittle was permitted to testify. There was no evidence on either side, as to who all the witnesses were, or what they testified to before Doolittle.

It was proved or admitted, that one William Matthews gave evidence for the prosecution before Doolittle, and Matthews, in March, 1848, when a former trial of this action was had, and ever since, had been and still was residing out of the commonwealth; and that his deposition had been taken to be used in the former trial by the defendants, for the purpose of showing what he swore to upon that examination, but that he could not remember what testimony he did give. His deposition was shown to the court, whereupon the defendants' counsel offered to show by Doolittle what Matthews's testimony was before him; but the presiding judge ruled, that this could only be done by Matthews in person or by his deposition.

Myron Lawrence, esquire, a counsellor at law, was then introduced as a witness by the defendants, for the purpose of making out probable cause, by showing what Matthews told Towne in his, Lawrence's, presence, touching certain confessions of Bacon, as to Bacon's having burnt his factory, and also for the purpose of proving the advice of counsel as a defence to the action or otherwise; and they offered to show, by this witness, that Matthews, in the presence of Lawrence, and before the complaint was made, told Towne that Bacon had confessed to him, Matthews, that he, Bacon, threw fire into the picker-room of his factory, whereby it was burnt; and that he, Matthews, had seen certain tools and other articles in his, Bacon's, dwelling-house, after the factory was burnt, under the bed in the house, which tools and articles came from Bacon's factory, as he, Matthews, knew; Matthews having the year before been a partner with Bacon, and having

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business at said factory with Bacon. But the presiding judge ruled, that this was not admissible for the purpose of showing probable cause, but that it might be admitted for the purpose of showing what the facts were, upon which Lawrence founded his opinion as counsel, given to Towne, as to the right and expediency of commencing a criminal prosecution against Bacon, for burning his factory and the grist mill, if he gave any advice, and he could give all the facts, and his statement was received for this purpose. It was admitted by the plaintiff, that the defendants did know, before the prosecution, that Matthews would testify to all that he did testify to before the magistrate, and at a subsequent period in the trial Lawrence testified to what Matthews stated before the magistrate, without objection.

The defendants then offered, in order to show probable cause and to rebut malice, one Squires, as a witness; and they proposed to show by this witness that Shaw's wife, and one Mary Randall, whose deposition was in the case, and parts of which were allowed to be read, soon after the fire, and before the complaint was made, communicated to Squires, the witness, with a request that he would communicate it to Towne, the fact that they were present at the time of the fire, and that they saw Bacon throw burning cotton into the picking-room of his factory, whereby it was burnt, and that he, Squires, did so communicate the same to Towne, before the complaint was made. But the presiding judge ruled that this evidence was inadmissible, and it was excluded.

The same evidence was offered by the defendants in mitigation of damages, but it was rejected by the presiding judge as inadmissible for that purpose. The defendants then offered to prove, in order to make out probable cause and in mitigation of damages, that the general character of the plaintiff, in the community where he resided at the time of the fire, was notoriously bad for honesty and integrity; but the presiding judge ruled, that evidence of this description was not admissible to show probable cause, and could only be admitted in mitigation of damages.

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The defendants then offered to prove what was testified to in the presence and hearing of Towne and Shaw, at the examination before Doolittle, (not as evidence given in a court of justice, but as statements or declarations made in his presence by third persons,) as furnishing probable cause for a prosecution. This evidence was considered as having particular application to Shaw, who the jury might find did not become a party to the prosecution till after the hearing at Doolittle's; and the plaintiff's counsel contending that he could recover on the second, third and fourth counts of his writ, all of which averred a prosecution commenced in June, 1847, which was long after the hearing at Doolittle's, it was contended by the defendants, if the jury should so find upon the other evidence in the case, that this evidence should be admitted in order to show what the defendants and Shaw in particular knew as to the plaintiff's guilt, and to show what was in the mind of the prosecutor when he commenced the prosecution.

The presiding judge having ruled that the first and fourth counts in the plaintiff's writ were bad, and that the plaintiff could only recover on the second and third counts, the plaintiff relied only on the act of the defendants in moving the prosecution before the magistrate to sustain these counts, and did not rely on any act done in reference to the indictment immediately. The conduct of the defendants afterwards was offered in evidence, as showing the motive with which they acted in instituting the prosecution, and as showing whether or not Shaw confederated in instituting it. The defendants also offered to prove the same facts, for the purpose of disproving malice and mitigating the damages; but the presiding judge ruled that this evidence was not admissible for any of these purposes.

The defendants also offered evidence to show, by the witness Squires, independent facts not in evidence before the magistrate, or proved to be known to the defendant when the complaint was made, having a tendency to prove that the plaintiff was actually guilty of the offence set forth in the indictment, and contended, that if the jury should be

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satisfied of his guilt, this would be a bar to the action, and if not, that it was very proper to be given in evidence in mitigation of damages. But the presiding judge ruled that this evidence was not admissible for either of these purposes.

Although it did not appear who all the witnesses were, who testified before Doolittle for the government, or for the plaintiff, or what they testified to, or who all the witnesses were for the government and the plaintiff at the trial at Northampton; it did appear, that Shaw and his wife, and Mary Randall, wife of Marcus Randall, named in the plaintiff's writ as one of the defendants, but acquitted at the former trial of the case by a verdict in his favor, and one Sholtz and William Matthews and Artemas Owen were witnesses for the prosecution before Doolittle; and that the same, except Matthews, were at Northampton, and testified for the prosecution, and that Delia Bacon, the plaintiff's daughter, and Albert Bacon, the plaintiff's son, were witnesses before Doolittle and at Northampton for the plaintiff. It was proved or admitted, that the plaintiff gave exculpatory evidence upon the trial at Northampton, and that many witnesses were examined for him upon the trial. Mrs. Randall and Mrs. Shaw were at the fire, and they testified before Doolittle and at Northampton that they saw Bacon throw burning cotton into the picking-room of his factory, whereby it was burnt. Sholtz and Delia Bacon and Albert Bacon were at the fire, and they testified to the circumstances attending the fire. It was proved or admitted, that the plaintiff was at work in his factory with Delia Bacon, Albert Bacon and Sholtz. The fire occurred at about two or three o'clock in the afternoon on the 3d day of March, 1846, when all the men of the village, save Sholtz and one Humes, who was sick abed, some five or six in number, were absent from the village.

The defendants gave evidence tending to show an over-insurance on the property lost by fire, and an over-valuation, &c., and also evidence showing that the plaintiff talked of pulling down his old factory and building anew; that the plaintiff had a motive and opportunity to commit the offence

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charged; and that these facts were known to the defendants, when the prosecution was commenced.

The question, so far as Towne was concerned, was not whether he was the prosecutor of the plaintiff before Doolittle, for it was admitted that he was; but the sole question was, whether he prosecuted upon reasonable and probable cause, or without probable cause and with malice; and as to Shaw the question was, whether he was a prosecutor at all either before Doolittle or at Northampton. His counsel insisted tha' he was merely a witness. But evidence was in the case tending to show that he was instrumental in getting up and carrying on the prosecution.

The account, which the plaintiff gave of the origin of the fire, connected with the account of it given by his own children and by Sholtz, all of which was proved to have been known to Towne, if not to Shaw, before the prosecution, was insisted upon by the defendants as furnishing abundant evidence of probable cause. The account of the origin of the fire given by the plaintiff seemed to imply spontaneous combustion. The factory had been owned formerly by Towne, and was built or repaired by Shaw, and the construction and situation of the building were well known to them. The time, place and circumstances of the fire, the construction of the building proved or admitted, and the unquestioned facts in the case, were relied on by the defendants, as showing that the fire could not have originated in spontaneous combustion.

The plaintiff contended, on the contrary, that every witness, or almost every witness, produced before Doolittle, was suborned, and that the whole testimony, or nearly all, for the prosecution, was false, and was known to be so by the defendants, and was got up by a conspiracy of the defendants to get the plaintiff indicted; and the plaintiff contended, that if the defendants did not know the testimony to be false, yet that the witnesses, particularly Mrs. Shaw, Mrs. Randall and Matthews, were wholly unworthy of credit at the time, that their reputation for truth and veracity was bad, and known to be so by the defendants.

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It was in evidence, that Shaw, soon after the fire, called upon Laban Marcy of Greenwich, counsellor at law, and made some statements of facts communicated to him, as to Bacon's setting fire to his factory, as he said, by his wife and Mrs. Randall, his daughter, with a view of taking legal advice as to what he should do touching the premises. Shaw was proved to have written a letter to the insurance company at Providence about the fire; and though neither Towne nor Shaw was proved to have had any thing to do with the actual finding of the second indictment, yet it appeared from the testimony of the district attorney, that he sent Shaw to Lowell after a witness; but this was before the first indictment was disposed of.

The plaintiff gave no evidence as to that part of the first count, and of the fourth count, which related to the burning of the grist mill, except what was furnished by the records put in. The plaintiff gave no direct evidence as to the burning of the grist mill; it came out in evidence, in the course of the trial, that the grist mill was a building adjoining or very near the plaintiff's factory, that the flames communicated from the factory, and it was consumed at the same time with the factory.

It was in evidence, that Towne and Shaw and Bacon had had suits and considerable litigation as to the factory and the grist mill, and that there were suits pending between Towne and Bacon at the time of the fire, and when the complaint was got up, growing out of the sale of the factory; and it was contended by the plaintiff, that one object Towne had in this prosecution was either to procure better security of the plaintiff for a debt, or to force a settlement of his matters with Bacon, or that it was got up from motives of private malice and revenge for the supposed burning of his grist mill.

It did not appear, that Towne and Ferry had any insurance on their grist mill, which was an old one, nor did it appear what its value was. It was proved or admitted, that neither Towne nor Shaw was present at the fire; Towne residing some four or five miles from the factory, and Shaw being

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on a journey at the time. It was in evidence, that no attempt was made to impeach the general character of Mrs. Randall for truth and veracity before the magistrate.

The presiding judge was asked by the defendants to give sundry instructions and directions to the jury, and among others the following:—

1. That it was not material whether the defendants did or did not in fact believe, that the plaintiff was guilty of the offence charged, if there was such a state of facts and circumstances really existing, as would have afforded reasonable and probable cause to any unprejudiced person in the defendants' situation for commencing a prosecution, as the defendants' belief or disbelief did not make and could not unmake any of the facts proved to exist in the case.

2. That the jury must be satisfied, affirmatively, that there was in fact no probable cause for the prosecution, and not merely that there was not apparently any probable cause; that there must not only not appear to be none, but that it must be proved that there was none; that if, upon the whole evidence, there should be any reasonable doubt whether the want of probable cause was made out by the plaintiff, then the jury must find for the defendants.

3. That if the finding of the magistrate was not absolutely conclusive, but could in any way be impeached, it could be done only by the production, by the plaintiff, of the whole evidence given for the prosecution and by the plaintiff, so that the court and jury could understandingly revise and correct the judgment of the magistrate; unless, indeed, it should so happen (which was not the case here) that the defendants should see fit to produce the whole evidence in the defence.

4. That if the jury should be of opinion, that there was no evidence to support the fourth count of the plaintiff's writ, which respects the charge for burning the grist mill, then the defendants should have a verdict on that count, it being for a separate and distinct cause of action.

5. That a mere acquittal of the plaintiff was not *prima facie* evidence of want of probable cause.

6. That a criminal prosecution of this kind might be right-

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fully commenced or instituted before a magistrate, upon representations of facts constituting, if true, probable cause, made and proved to have been made by third persons to the prosecutor, before the complaint was made.

7. That a criminal prosecution of this kind might be lawfully commenced or instituted upon less evidence than would be required to convict, as in case of conviction the jury would have a right to require that all doubt should be removed; whereas, here nothing should be required but such evidence as would justify any unprejudiced person of common capacity to believe the party guilty.

8. That the defendants were not to be held to show, that they had such evidence as would convince every unprejudiced and ingenuous person, of common capacity and common cautiousness, of the probable guilt of the plaintiff; but only such evidence, or degree, or amount of evidence, as would be sufficient to induce any ingenuous and unprejudiced man of common capacity and common cautiousness, in the defendants' situation, to believe the plaintiff guilty; that the true question for the jury was, whether, out of this whole class of persons who were unprejudiced and of common capacity and of common cautiousness, any man could be found who would or could on this evidence believe the plaintiff guilty; and not whether every person of that class would believe him guilty on such evidence.

9. That if Shaw and Towne, or either of them, knew, before the complaint, that Mrs. Randall and Mrs. Shaw had stated that they saw Bacon throw burning cotton into the picker-room of his factory, and Mrs. Shaw and Mrs. Randall were so situated that they could be summoned as witnesses for the commonwealth, and the jury should believe that they were not then of bad reputation for truth and veracity, then there was probable and reasonable cause for this prosecution to the one so acting on it, unless the defendants knew, or had reasonable cause to believe, that such statements were false.

10. That if Shaw or Towne, or either of them, had been told, before complaint made, by Mrs. Shaw and Mrs. Randall,

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that they saw Bacon throw burning cotton into the picking-room of the factory, then there was reasonable and probable cause to commence this prosecution, if they, Mrs. Shaw and Mrs. Randall, were within reach of process, and there was a reasonable certainty of procuring their attendance as witnesses, unless they were of general bad reputation for truth in that community, or unless the plaintiff should show that the defendants knew or had reasonable cause to believe that such statements were false; or if Mrs. Randall only had so stated to Shaw and Towne, with the above qualification and limitations, then there was reasonable and probable cause for this prosecution to the one so acting on it; or if Mrs. Shaw so stated as aforesaid, then there was reasonable cause.

11. That if the jury should believe, that Towne and Shaw agreed together to prosecute the plaintiff, then the knowledge which one of them had, they might presume, was communicated to the other, so that facts known to one were known to both.

12. That if the defendants, before the complaint, had been told by Mrs. Shaw the story which it was proved she swore to on the trial before Doolittle, and had reasonable cause to believe her attendance could be procured as a witness, and the defendants did not know or have reasonable cause to believe her story to be false, and her reputation for truth was not bad, then there was reasonable and probable cause to commence this prosecution when it was commenced.

13. That the true question was, whether these facts were sufficient to make out probable cause known to the defendants when this complaint was made; and that if the jury should believe that the defendants knew the following facts, that is to say, [enumerating the facts tending to show probable cause,] then there was probable cause for this prosecution, and the jury had only to find whether these facts existed or not.

14. That if the defendants, before the complaint was made, knew of the testimony of Sholtz given before Doolittle

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and they had reasonable cause to believe that he could be had as a witness, then there was reasonable and probable cause for the complaint, unless Sholtz was of bad reputation for truth, or the defendants knew or had good cause to believe his story false.

15. The judge was requested to make the same charge as to the combined independent accounts of Sholtz and Mrs. Shaw given before the justice, and so as to the combined accounts of Mrs. Shaw and Sholtz, of Owen and of Matthews.

16. The judge was also requested to charge the jury, whether any, and, if any, which, of the facts, proved to have been known to the defendants before the complaint, would have constituted and made out probable cause, if the defendants had good cause to believe, that they could procure the witnesses who had given the information to attend and give evidence in the cause.

The presiding judge ruled and charged the jury, as prayed for in the first, second, fifth and eleventh of the foregoing articles, and refused to charge according to the third. As to the other articles, namely, the sixth, seventh, eighth, ninth, tenth, twelfth, thirteenth, fourteenth, fifteenth and sixteenth, the judge instructed the jury as follows: —

The facts shown at the trial before the magistrate, in favor of the prosecution, were presumed to have been known to the defendants, at the institution of the prosecution; but this presumption did not extend to the facts tending to show the innocence of the plaintiff. Whether or not the latter were known to the defendants as well as the former, was a question to be determined from their connection with the former and from other evidence. Facts not proved at that trial, and not known to the defendants, though tending to prove the plaintiff's guilt, would not justify them. The jury must look at the case as it appeared to the defendants at the time of instituting the prosecution. The present issue was not whether the plaintiff was guilty or not guilty, but whether the defendants had reasonable cause to believe him guilty.

The defendants must be shown to have acted maliciously

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and without reasonable cause. Though gross want of probable cause might be evidence of malice, yet no degree of malice would be sufficient to make the defendants liable, if they had probable cause; and if the defendants acted in good faith, without malice, they were justified, however much mistaken they might have been. Both malice and want of probable cause must be shown to support the action, and the burden of proof was on the plaintiff to prove both these facts. If the defendants fabricated evidence or tampered with witnesses to try to convict the plaintiff, yet if they had evidence without this, which was sufficient to constitute probable cause, they were to be acquitted here. Malice consists in a "bad mind," that is, either a direct intention to injure, or that degree of bad motive, or ill will, which would lead the mind to conclusions not warranted to the understanding of an impartial mind. Probable cause consists in that degree of evidence, which would induce a reasonable man to believe the accused party guilty; such as would convince or satisfy men of the usual and ordinary caution and judgment, when not governed by malice. What is probable cause, the facts being known, was a question of law for the court. In the application of the law to the facts, the jury must find whether such facts existed as the court should advise them were sufficient to constitute probable cause.

The judge declined to charge as the defendants requested, by going over all the facts, and stating how many of them, or what changes upon them, in all possible combinations, would, if believed, make out probable cause; but instructed them, that the evidence might be considered as tending to establish three propositions or facts, namely: 1. An interest or motive in the plaintiff to commit the crime; 2. Guilty conduct or acts or knowledge of the plaintiff; and, 3. That the fire was the act of an incendiary.

If they should find any two of these facts or propositions proved, they would be sufficient to constitute probable cause, and neither alone would be sufficient. A man was not to be convicted merely because a crime had been committed, nor because he had a motive to commit it, nor because his

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conduct was singular or inexplicable, and such as would indicate guilt in the absence of one of the other facts.

If they should find, for example, in the over-valuation of the property, or otherwise, a motive in the plaintiff to destroy his factory, that alone would not, but that coupled with the fact that the act was incendiary, or with strong evidence of guilty consciousness, or such conduct as was inexplicable on a different hypothesis, would make sufficient probable cause; or, —

If they should find that the fire was the act of an incendiary, that fact alone would not, but that fact with such conduct on his part as above described, or with the fact of his having a motive to do it, as shown in such an over-valuation as would indicate dishonesty, would make sufficient probable cause; or, —

If they should find evident consciousness of guilt, exhibited in the plaintiff's conduct, and also find the act to have been incendiary, or that the plaintiff had a strong motive to commit this crime, they might then infer that the fire was incendiary, and that he was the guilty party, and therefore that there was probable cause. But that merely suspicious conduct, in the absence of evidence that the fire was criminal, and in the absence of any motive to burn the factory, or either of these circumstances, in the entire absence of the other two, would not make sufficient probable cause for the prosecution.

The facts stated by Mrs. Shaw and Mrs. Randall, or either of them, would, if known to the defendants, unquestionably be sufficient probable cause, provided the defendants might reasonably have believed them. But the mere fact that they knew those witnesses would so swear would not justify a prosecution, if, from the character of the witnesses, or from the other facts and circumstances known to the defendants, they could not, as reasonable and fair men, have given them credit.

The jury, under these rulings and instructions, rendered a verdict for the plaintiff, and the defendants alleged exceptions.

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P. C. Bacon, for the defendants.

W. A. Bryant and *L. Williams*, for the plaintiff.

Shaw, C. J. This is an action on the case against three defendants for a malicious prosecution, in making a complaint before a magistrate and procuring an indictment against the plaintiff, for unlawfully burning the factory in his occupation, for the purpose of defrauding the insurers upon it. It appears that the defendants laid a complaint before the magistrate, charging the plaintiff with the wilful burning of his factory to defraud the insurers, and also with burning a corn mill of the defendants. The plaintiff was bound over, and subsequently was indicted for those offences; but in consequence of a defect in the indictment, the public prosecutor entered a *nolle prosequi* thereon, and forthwith, another indictment was laid before the grand jury, for that part of the offence, which consisted in burning the factory, omitting the mill, and was found upon the evidence already given; upon which last indictment the plaintiff was tried and acquitted, whereupon this action for malicious prosecution was brought, and the plaintiff obtained a verdict. Sundry exceptions were taken at the time, by the defendants, which now come before us on a bill of exceptions.

The court below ruled, that the plaintiff could not recover on the first and fourth counts, because, as we understand, those counts averred a discharge from the indictment by a *nolle prosequi*, which was not sufficient to maintain the action. This decision, being in favor of the defendants, does not arise on their bill of exceptions; but as the question may arise, if the cause should be tried again, it is proper to say, that we consider the decision right. It must appear, before this action will lie, that the defendant in the indictment has been fully acquitted; but a *nolle prosequi* is no discharge of the crime, and no bar to a new indictment, even if it precludes the government from suing out new process, requiring the party to answer to the same indictment, which may be more doubtful. *Goddard* v. *Smith*, 6 Mod. 262; *S. C.* 1 Salk. 21; *S. C.* 2 Salk. 456; opinion of Buller, J., in *Morgan* v. *Hughes*, 2 T. R. 231; *Croke* v. *Dowling* Bull. N. P. 14.

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1. The first exception taken by the defendants is, that the judgment of the magistrate, binding the plaintiff over to answer, was conclusive evidence of probable cause. This is certainly not within the authority of the case of *Whitney* v. *Peckham*, 15 Mass. 243, because the magistrate, in the present case, had no legal jurisdiction to hear and decide finally, but only to bind over, which is a mere preliminary step to further proceedings. But the authority of that case has been somewhat questioned in *Burt* v. *Place*, 4 Wend. 591. If regarded as evidence of probable cause, we think it is *prima facie* only, and not conclusive.

2. The defendants excepted to the admission of the record and proceedings before the magistrate, on the ground, that as the first indictment to which they led was withdrawn by a *nolle prosequi*, these proceedings became immaterial. But the court are of opinion that these proceedings were admissible. They were instituted by the defendants as complainants, and they led to the prosecution by indictment. The second indictment was in the nature of an amendment or supplement to the first; the original complaint, and binding over, was the efficient cause of the second indictment; otherwise the defendants had no connection with the actual prosecution, on which the plaintiff was acquitted by verdict of a jury; and upon these grounds, it should be decided, that this action cannot be maintained. This evidence was competent, not because the prosecution before the magistrate is itself the malicious prosecution complained of, but to connect the subsequent proceedings in the court of common pleas with the acts of the defendants.

3. Evidence was offered to control or impeach the finding of the magistrate, as any evidence of probable cause, on the ground, that he had acted unfairly and improperly in the examination. This, though objected to by the defendants, was admitted. No authority was offered in support of this decision, and the court are of opinion, that the evidence could not properly be admitted. It is not competent, we think, with a view to avoid the effect or impair the weight of a judgment, rendered by a court or magistrate, acting judicially within

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his jurisdiction, to prove partiality or unfairness, in the particular case. A party actually convicted by a jury might, upon similar ground, contend that such conviction was obtained by bribery or other misconduct; that the party ought to have been acquitted upon the law and evidence; and that such conviction ought not to stand as evidence of guilt, or even of probable cause. Records of judicial proceedings have a certain intrinsic value and effect, ascertained by general rules of law, to which it is important to adhere. *Sayles* v. *Briggs*, 4 Met. 421.

4. It was insisted, on the part of the defendants, that it was the duty of the plaintiff to give in evidence all the evidence given before the magistrate, on the part of the prosecution, to the end that the court might determine whether there was or was not probable cause; but the presiding judge ruled that it was not necessary. We can perceive no tenable objection to this decision. The plaintiff must, undoubtedly, prove his case, a material averment of which is, that the prosecution was commenced without reasonable or probable cause, and the proof of this, though a negative proposition, lies on the plaintiff. But no rule requires that he shall prove all that took place on the trial of the case complained of, in which the plaintiff was acquitted; *a fortiori* we are not aware of any such rule, in regard to a preliminary inquiry before the magistrate. *Biggs* v. *Clay*, 3 Nev. & Man. 464.

5. It was next contended by the defendants, that the second indictment, found in June, 1847, was an independent prosecution, and not founded on the complaint made before the magistrate, and therefore was one for which the defendants were in no way responsible. And it was insisted, in confirmation of this view, that such second indictment did not charge the unlawful burning of Towne's grist mill, being the only part of the alleged offence, in which the defendants were specially interested. But the court did not sustain this view, but considered the second to be connected with the first, as effect and cause, so that the defendants might be the efficient cause of the second.

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This seems to have been rather a matter of fact than of law, depending on the evidence. If one indictment was nol-prossed, and another returned on the same evidence, and for a substantive part of the same charge, to avoid a formal defect, we cannot say, that the original complaint made by the defendants was not the actual cause of the latter.

6. The next exception was, that the plaintiff had given no evidence, that the jury, on the trial of the criminal charge, had acquitted the plaintiff promptly, and without hesitation, delay or deliberation. It appears by the bill of exceptions, that no evidence was offered on this point on either side. The defendants' counsel insisted, and they have renewed that argument here, that the plaintiff was bound to prove affirmatively that the jury did not so pause or deliberate.

We see no ground, on which to sustain this exception. Suppose the fact of their pausing or not may have a bearing on the question of probable cause, as held in *Smith* v. *McDonald*, 3 Esp. R. 7, it is not necessary and indispensable evidence; the same essential fact may be proved by other competent evidence,

7. The defendants, having opened and stated their defence, offered Mark Doolittle, esquire, the magistrate, to prove what the testimony before him was, on the part of the government, to prove probable cause, and rebut the allegation of malice; but the presiding judge ruled, that this could only be done by the same witnesses who were produced on the stand, or their depositions, except as to testimony then given by the defendants or their wives. To this rejection of evidence the defendants objected.

The court are of opinion that this exception must be sustained. It was of vital importance for the defendants, in answer to any proof of want of probable cause, to prove affirmatively, that they had reasonable and probable cause for the prosecution, at the time the proceedings in it were commenced.

Probable cause is such a state of facts in the mind of the

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prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty. The facts testified to on the examination may have been very influential in raising such suspicion or belief, and are therefore competent evidence to show the ground he had of cause to believe, whether they were true or not. They are therefore facts material to the issue, to be proved by any witnesses who can testify to them, as well as by those who testified at the examination. Those witnesses may be dead, absent or insane; they may have forgotten them, or refuse to testify to them, or even deny them; it is not the less true that they did so testify, and if the testimony was of a character to induce a belief or strong suspicion, in the mind of a reasonable man, of the guilt of the accused of the crime charged, they had a direct bearing on the issue of probable cause or not, in the action for malicious prosecution. 2 Greenl. Ev. § 454; *French* v *Smith*, 4 Verm. 363.

Probable cause does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution. *James* v. *Phelps*, 11 Ad. & El. 483, 489.

The only case we are aware of, which seems to countenance an opposite rule, is that of *Burt* v. *Place*, 4 Wend. 591, which was a case of gross fraud and oppression under the forms of law, practised by the defendant himself, and in which there was abundant evidence of malice, groundlessness and fraudulent design, in the suits complained of as malicious.

The general rule is stated in Bull. N. P. 13, 14; 2 Greenl. Ev. § 449; Steph. N. P. 2282, 2284; *Wilmarth* v. *Mountford*, 4 Wash. C. C. 79.

8. This exception was substantially the same, except that it applied to the testimony of Matthews, whose deposition was taken, but who failed to recollect what his testimony was before the magistrate. For the reason already given, the proof offered of his testimony before the magistrate ought to have been received, because it might have operated to produce a reasonable belief of the guilt of the plaintiff; and the

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knowledge that he would so testify might have been one of the grounds on which the defendants made their complaint before the magistrate. *French* v. *Smith*, 4 Verm. 363.

Indeed, it appears by the bill of exceptions, that the defendants did know before the commencement of the prosecution, that Matthews would testify to the facts, which he did in fact testify to on the examination.

9. In order to rebut malice and show probable cause, the defendants offered one Squires as a witness, who would testify that two women, Shaw's wife and Mary Randall, soon after the fire, and before the complaint, communicated to the witness, with a request that he would communicate to Towne, the fact, that they were present at the fire, and saw Bacon, the plaintiff, throw burning cotton into the picking-room of his factory, whereby it was burnt, and that he did so communicate the information to Towne before the complaint. The presiding judge rejected this evidence as inadmissible.

We cannot perceive upon what ground this evidence was rejected. It had a direct tendency to create a belief in the minds of the defendants of the plaintiff's actual guilt of the offence charged. The reason assigned by one of the defendants' counsel is, that it was hearsay; but we think, in the ordinary transactions of life, men do not hesitate to act on information until they put their informants upon oath, if, indeed, such oath would not be extrajudicial and unlawful.

The reason assigned by the other counsel is, that these women testified to the same facts before the magistrate. Without adverting to the fact that proof of such testimony was rejected, it was important for the defendants to show, that this information was communicated to them before the complaint, and therefore that they had reasonable expectation of being able to prove it. We think this evidence ought to have been received and laid before the jury. *Broad* v. *Ham*, 5 Bing. N. C. 722.

10. We are inclined to think that evidence of the general bad reputation of the plaintiff should have been admitted, to rebut the proof of want of probable cause, as well as in mitigation of damages. The proof of want of probable

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cause lies on the plaintiff. The same facts, which would raise a strong suspicion in the mind of a cautious and reasonable man, against a person of notoriously bad character for honesty and integrity, would make a slighter impression if they tended to throw a charge of guilt upon a man of good reputation. *Rodriguez* v. *Tadmire*, 2 Esp. R. 721; *Wood* v. *United States*, 16 Pet. 342, 366; 2 Greenl. Ev. § 458. But see *Newsam* v. *Carr*, 2 Stark. R. 69.

11. The exception relating to the defendants' offer to prove what was testified tc in the presence and hearing of Towne and Shaw, at the examination before Doolittle, not as evidence given in a court of justice, but as statements or declarations made in the magistrate's presence by third persons, as furnishing probable cause for a prosecution, was not argued.

12. The court are of opinion, that under our present forms of proceeding, where special pleading is not admissible, a defendant may, to rebut malice, and prove probable cause, show facts tending to prove the actual guilt of the plaintiff of the criminal charge imputed to him, though the defendant is not prepared with evidence to show that such facts were within his knowledge at the time of the complaint. If they were then true, and existed, they might have been known to the defendant, though he cannot now prove how he knew them, and though they were not so within his personal knowledge, that he could testify to them on the trial of the indictment. But if it were doubtful, whether they could be given in evidence for these purposes, the court are of opinion that they were competent in mitigation of damages, and ought to have been received in evidence. *Bell* v. *Pearcy*, 5 Ired. 83.

13. The exception relating to proof by the defendants of their own conduct, in order to disprove malice and mitigate the damages, the same facts having been already in evidence on the part of the plaintiff, to show the defendants' motive in instituting the prosecution, is not material to be considered.

14. The court are of opinion, that the judge, at the trial, should have somewhat more distinctly directed the jury, what

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leading facts, or classes of facts, if proved to the satisfaction of the jury, would constitute reasonable and probable cause for the prosecution, and what would not, leaving the facts and the inferences to be drawn from them to be found by the jury. The judge declined so to instruct the jury, but instructed them, that the evidence might be considered as tending to establish these propositions or facts:—

1. An intent or motive in the plaintiff to commit the crime; 2. Guilty conduct, or acts, or knowledge of the plaintiff; 3. That the fire was the act of an incendiary; and that if they found any two of these propositions proved, they would constitute probable cause, but that neither alone would be sufficient. We are of opinion that this direction was not correct in matter of law.

It is very questionable, whether, if the plaintiff had a motive to burn his factory, and it was true that the factory was wilfully burnt, it would be sufficient to raise a strong suspicion against the plaintiff, without some further evidence to fix the charge on him. But further, guilty conduct, acts and knowledge, alone, if they were of such a nature as to make them bear upon this particular charge of burning his factory, such as manifestations of conscious guilt, obscure and equivocal admissions, futile attempts to attribute the fire to other causes, and the like, might be alone sufficient to raise that belief or suspicion, which would amount to probable cause. But guilty knowledge, acts and conduct, if they did not lead to a belief of the plaintiff's guilt of this particular charge, would not alone, or with either of the other hypothetical cases, amount to proof of probable cause. In order to enable the jury to pass upon the facts in question, and the court to decide whether in law, if proved, they would constitute probable cause, the evidence tending to prove the prominent facts of the particular case should have been distinctly laid before the jury, with a more specific direction as to the law. *Panton* v. *Williams*, 2 Ad. & El. N. S. 169.

Verdict set aside, and new trial ordered.

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JOHN B. FLAGG *vs.* THE INHABITANTS OF MILLBURY.

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By a work of "necessity," as mentioned in the exception to the prohibition of labor, business, or work, on the Lord's day, in the Rev. Sts. *c.* 50, § 1, is not meant a physical and absolute necessity; but any labor, business or work, which is morally fit and proper to be done on that day, under the circumstances of the particular case, is a work of necessity within the statute.

Where a defect in a highway, for an injury occasioned by which to person or property the town would be liable, is found to exist on the Lord's day, it is the duty of such town to cause the defect to be repaired immediately, or to adopt measures to guard against the danger, until such repair can be made; and work, labor, or business, for this purpose, is a work of necessity within the statute respecting the observance of the Lord's day.

In computing the time of twenty-four hours, during which a defect in a highway must have existed, in order to render the town liable for an injury occasioned thereby, within the Rev. Sts. *c.* 25, § 22, the time of Lord's day is to be included.

THIS was an action on the case to recover damages for an injury sustained by the plaintiff on the 22d of May, 1848, by reason of an alleged defect in a highway in the town of Millbury.

At the trial, which was before *Shaw*, C. J., it appeared that the injury to the plaintiff occurred on Monday the 22d of May, 1848, at about nine o'clock in the forenoon. The defendants contended that they were not liable, unless the defect had existed for twenty-four hours previously to the time of the injury, exclusive of Sunday; and they introduced evidence tending to show that it had not so existed. The plaintiff contended that Sunday was not to be excluded in the computation of the twenty-four hours, and introduced evidence tending to show that the defect had existed for twenty-four hours previous to the accident.

The judge declined to instruct the jury, as suggested by the defendants, but instructed them, that the plaintiff would not be entitled to recover, unless the defect had existed for twenty-four hours, at the time the accident occurred, and that in the computation of this time Sunday was not to be excluded. The jury found for the plaintiff, and the defendants excepted.

WILDE, J. At the trial, it became material to ascertain

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how long the defect, if any, had existed before the injury to the plaintiff occurred; it being necessary to be proved, to entitle the plaintiff to recover, that it had so existed for the space of twenty-four hours. Rev. Sts. *c.* 25, § 22. Upon this point the defendants' counsel requested the court to instruct the jury, that in the computation of time Sunday was to be excluded; but the court held otherwise, and so instructed the jury; and we are of opinion that this instruction was right.

The argument for the exclusion of Sunday is founded on the erroneous assumption, that to repair a defect in a highway, however necessary it may be to secure the public safety, would be a violation of the statute to enforce the observance of the Lord's day. Rev. Sts. *c.* 50, § 1. But it is quite clear, that the statute is not to be so construed; on the contrary, works of necessity and charity are expressly excepted from the prohibition of labor, business and work in the first section; and, certainly, any work and labor necessary to be done to secure the public safety must come within the true meaning of the exception in the statute.

By the word "necessity" in the exception we are not to understand a physical and absolute necessity; but a moral fitness or propriety of the work and labor done, under the circumstances of any particular case, may well be deemed necessity within the statute; and so it was decided, in the construction of a similar exception, in the prohibition against travelling on the Lord's day, in the statute of 1791, *c.* 58, § 2. *Commonwealth* v. *Knox*, 6 Mass. 76; *Pearce* v. *Atwood*, 13 Mass. 354. Now, when a defect in the highway is discovered on the Lord's day, which may endanger the limbs and the lives of travellers, it is not only morally fit and proper that it should be immediately repaired, but it is the imperative duty of the town, which is bound to keep the highway in repair, to cause it so to be done, or to adopt means to guard against the danger, until it can be done, and work and labor for this purpose is no violation of the law, or of religious duty.

Exceptions overruled.

A. G. Randall, (with whom was *P. C. Bacon*) for the defendants.

C. Allen, for the plaintiff.

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Horace Leland *vs.* Asa Woodbury & others.

The remedy by assumpsit or debt, given by the Rev. Sts. *c.* 116, § 24, to enforce payment of the annual compensation or gross damages, awarded under the provisions of the same chapter, for the flowing of land for the purposes of a mill, is not cumulative, but is substituted for and takes away the common law remedy by an action of debt on the judgment. Such action can only be brought against the owner or occupant of the mill, and it must be alleged in the declaration, that the defendant is such owner or occupant.

The plaintiff, as the assignee in insolvency of Nathaniel G. King, brought an action of debt against the defendants, Asa Woodbury and eight others, upon a judgment recovered at the September term of the court of common pleas in the year 1839. This judgment was rendered upon the award of arbitrators, on a petition filed against the defendants, as mill owners, for flowing the land of King, the insolvent. The arbitrators assessed the petitioner's annual damages at the sum of $35, and his gross damages at the sum of $500; and the petitioner duly filed his certificate in the clerk's office of his election to take the gross damages.

This action not having been brought within three years from the time of the rendition of the judgment; and the defendants not being alleged in the declaration to be the owners or occupants of the mill which caused the injury; the defendants objected, on these grounds, that the action was not brought in conformity with the provisions of the statute, (Rev. Sts. *c.* 116, §§ 21, 24,) relating to the erection and regulation of mills.

The chief justice of this court, before whom the cause was tried, ruled that the action could not be maintained, for the reasons above stated, and also for the further reason, that the special judgment set forth in the declaration was of such a nature, that an action of debt by an assignee could not be maintained upon it.

The plaintiff thereupon became nonsuit, subject to the opinion of the whole court.

R. Newton, for the plaintiff.

C. Allen, for the defendants.

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WILDE, J. This is an action of debt on a judgment recovered in the court of common pleas upon a petition against the defendants, as mill owners, for flowing the petitioner's land. The judgment was rendered on the report of referees, who assessed the petitioner's annual damages at the sum of $35, and his gross damages at the sum of $500; and the petitioner duly filed his certificate in the clerk's office of his election to take the gross damages. Upon these facts, the question is, whether this action can be maintained to recover the damages, either annual or in gross, as assessed by the referees, which it is admitted have never been paid.

As to the gross damages, it is very clear, that the mill owner or occupant is entitled to elect either to pay the damages and interest, or to lose all benefit of the act for the erection and regulation of mills, until he shall pay such damages and interest. Rev. Sts. *c.* 116, § 21. The only remedy provided by the statute for the party entitled to such damages, if the mill owner or occupant refuses to pay, is under the twenty-fourth section, which provides for an action of assumpsit or debt therefor, against the person who shall own or occupy the mill when the action is brought; and the plaintiff is therein to recover the whole sum due or unpaid for three years then last past. But as it is not averred in the declaration, that the defendants were owners or occupants of the mill at that time, nor did it appear that they were, this action cannot be maintained.

It has been argued for the plaintiff, that the remedy provided by the statute is cumulative, and does not take away the common law remedy to enforce the judgment. But we think this argument cannot be maintained. The general rule in this respect is, that where a statute creates a new offence, or a new liability, and appoints a specific remedy against such new offence, or to enforce such new liability, that specific remedy is to be pursued and no other. *Rex* v. *Robinson*, 2 Bur. 799, 803.

In the present case, the remedy provided by the statute is inconsistent with the common law remedy. By the former, the action lies against the owner or occupant of the mill at

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the time when the action is brought; and by the latter the action can only lie against the party against whom the judgment was recovered. It is obvious, therefore, that no action can be brought against the defendants on the judgment for gross or annual damages, unless they were owners or occupants of the mill at the time when this action was commenced.

There were other grounds of defence taken at the trial, which we have not found it necessary to consider, as one valid ground of defence is sufficient.

Nonsuit to stand.

JOSEPH BIGELOW & Wife *vs.* THE INHABITANTS OF RUTLAND.

In an action against a town for an injury occasioned by a defect in a highway, the question whether or not there was negligence, or want of ordinary care, on the part of the plaintiff, is to be determined by the jury, under all the circumstances of the case.

IN this case, which was argued in this court by *C. Allen*, for the defendants, and *W. A. Bryant*, for the plaintiffs, on exceptions to the ruling of *Hopkinson*, J., before whom it was tried in the court of common pleas, the facts appear in the opinion of the court.

FLETCHER, J. This is an action on the case, for damages alleged to have been sustained by the plaintiffs, by a defect in a highway in the town of Rutland, which, it was agreed, the defendants were bound to keep in repair. The injury was occasioned by the wheels on one side of the plaintiffs' carriage running into a ditch on one side of the travelled part of the highway, by means of which the wife was thrown out and injured. There was evidence, that, just before the accident, the husband had left the carriage and placed the reins in the hands of his wife, and that the reins were improperly held by her, being crossed as she received and held them.

The counsel for the defendants requested the presiding judge to instruct the jury, that if they should find that the

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way was unsafe by reason of the ditch, and should be satisfied also that the horse was guided out of the travelled way into the ditch, in consequence of the reins having been accidentally crossed when they were delivered by the said Joseph to his wife, and that thus the accident occurred, the defendants would not be liable for the damage which the plaintiffs sustained. The presiding judge declined so to instruct the jury, and left the question, whether the plaintiffs were using ordinary care, to the jury, as one of fact to be determined by them, they having reference to all the circumstances connected with the transaction, and to find whether there was a want of ordinary care, by the said Joseph or his wife, in so handling, taking, or holding the reins.

The principles of law applicable to this case are well settled and very familiar. The plaintiffs must show, that there was no want of ordinary care on their part; that there was negligence on the part of the town, in the performance of their duty, to keep the highway in a safe and proper condition; and that the plaintiffs were injured, as alleged, by reason of this negligence on the part of the town. Want of due care is imputed to the plaintiffs, in the present case, on the ground that the reins were crossed when they were delivered by the husband to the wife, and that the wife thus held them, and in consequence misguided the horse.

The case expressly finds, that the manner in which the reins were delivered by the husband to the wife was accidental. So far as appears from the report, there might or might not have been culpable negligence, or want of ordinary care, on the part of the plaintiffs, in handling, taking and holding the reins.

If the accident happened by reason of the reins being crossed when delivered to the wife, that is expressly found to have been accidental. The reins may become crossed even in the hands of prudent and careful persons; so there might or might not have been a want of ordinary care, on the part of the wife, in guiding the horse. Whether or not, under all the circumstances of the case, there was any negligence or want of ordinary care, on the part of the plaintiffs, was a

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matter to be inquired of and ascertained by the jury. The court was, in effect, asked to determine the question of ordinary care; but all the court could do, was to instruct the jury to consider and determine that question, upon all the evidence before them. This instruction was fully given, and to this there is no exception.

The exceptions, therefore, must be overruled, and judgment rendered on the verdict.

JOSEPH ROBINSON *vs.* CHARLES TRULL.

In order to enable the party aggrieved to maintain an action on the case to recover damages against a witness for failing to attend and testify, the plaintiff must prove that the witness was duly summoned, and that his fees for travel and attendance as such were duly paid or tendered to him, according to the requisitions of the Rev. Sts. *c.* 94, § 3; and it is not sufficient, in such case, to prove a waiver, on the part of the witness, of his right to service and fees.

THIS was an action on the case, to recover damages against the defendant, for failing to attend and testify as a witness, in a suit brought by the plaintiff against one Wadsworth, and pending in the court of common pleas for this county.

At the trial, which was before *Hopkinson*, J., in the court of common pleas, it appeared, that on the trial of the case of *Robinson* v. *Wadsworth*, the defendant was present in court as a witness, on behalf of the plaintiff, and that he left the court room without testifying, before he was called, and without leave. It was admitted, that he had not been summoned or received his fees; but there was evidence tending to prove that a subpœna had been duly sued out and placed with sufficient fees in the hands of a person authorized to serve the same. The judge ruled, that proof of service of summons and tender of fees was not necessary; that a waiver of the right to service and fees might be proved; that a waiver in express terms was not requisite, but might be proved by inference from facts; and that it was not an inference implied by law from the fact of the defendant's

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appearance; but that the appearance was competent evidence tending to show the defendant's intention to waive his right to service and fees.

It appeared, that the jury, in the case of *Robinson* v. *Wadsworth*, disagreed; and evidence was introduced by the plaintiff to show what would have been the substance of Trull's testimony, if he had testified, and that it was competent and material to the issue; but no evidence was offered to show what effect Trull's testimony would have had upon the minds of the jury, either by any member of that jury, or by any person who was cognizant of the trial, to express an opinion as to what its effect might have been. The judge ruled that the jury might judge whether the evidence was so important, that it might affect the result in a balanced case, and that it was not necessary for them to be satisfied, that Trull's testimony would have been sufficient to have produced an agreement in that particular case.

The jury brought in a verdict for the plaintiff, and the defendant alleged exceptions.

W. A. Bryant, for the plaintiff, referred to *Pearson* v. *Iles*, Doug. 556, 561; *Masterman* v. *Judson*, 8 Bing. 224; *Bland* v. *Swafford*; Peake's Ca. 60; *Barrow* v. *Humphreys*, 3 B. & Ald. 598; 1 Stark. Ev. 79; 1 Gr. Ev. § 311.

There was no appearance for the defendant.

Fletcher, J. The ruling of the court below was erroneous, as being inconsistent with the express and positive provisions of the Rev. Sts. *c.* 94, §§ 3, 4.

Exceptions sustained.

Charles J. Fry *vs.* The Inhabitants of School District Number One in Athol.

The power conferred by law (*St.* 1789, *c.* 19, § 2; Rev. Sts. *c.* 23, § 24,) on towns, to determine and define the limits of school districts, can only be executed by a geographical or territorial division.

Where the inhabitants of a town, in the exercise of the power conferred upon them by the act of 1789, *c.* 19, § 2, to determine and define the limits of school districts,

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established the several districts therein by an enumeration of the inhabitants belonging to each, but without any geographical or territorial division, and the districts so established were in fact in existence, when the act of 1817, c. 14, was passed, by which school districts were made bodies corporate for certain purposes; it was held, that such districts were not thereby established as legal districts.

The inhabitants of a town are not authorized by law to form a portion thereof into a school district, leaving all the residue of the town not districted.

THIS was an action of assumpsit brought originally before a justice of the peace, to recover of the defendants the sum of $8·67 assessed upon the plaintiff, and paid by him upon a compulsory process. The case was submitted to the court upon an agreed statement of facts.

The town of Athol, at legal meetings held on the 22d of August, and 6th of September, 1799, under an article in the warrant "To make such alterations in school districts as the town may think proper, and also to establish the limits of said school districts," voted that the town be districted into seven districts, by enumerating the several individuals composing each district, but without any geographical or territorial division for that purpose. At a subsequent meeting on the 25th of December, in the same year, the town voted to unite the fourth and seventh districts into one.

On the 26th of April, 1847, a town meeting was called and held, among other things, to see if the town would set off from school district number one all the estates therein lying east of the houses of certain individuals named, and form a new school district. At this meeting, the town voted to divide school district number one as indicated in the warrant, and that all the territory, persons and estates therein, lying east of a line particularly described and established, be formed into a new school district, with all the privileges of other school districts in the town.

On the 12th of June, 1847, a meeting of the town was held pursuant to a warrant issued by a justice of the peace, on the ground that the selectmen had unreasonably neglected and refused to call a meeting, to see if the town would reconsider a vote at their last meeting, by which a part of district number one was set off therefrom, and made into district number fourteen, and reannex the sam

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to district number one. At this meeting, the vote in question was reconsidered, and the new district reannexed to number one.

On the 7th of August, following, a meeting was held, pursuant to a warrant from the selectmen, to see if the town would reconsider and annul the vote of April 26th, creating district number fourteen, and reannex the same to district number one, or do any thing in relation thereto; and also to see if the town would cause their several school districts to be surveyed, and their limits defined, or do any thing in relation thereto. At this meeting, it was voted, that the vote of June 12th be confirmed, and that a committee of one from each school district be appointed, for the purpose of defining the limits of the several school districts and make report thereon to the town.

At a subsequent meeting held for the purpose on the 11th of October following, to hear the report of the committee above mentioned, and act thereon, the committee made a report defining the limits of the several school districts, by territorial boundaries, and recommending the establishment thereof as the boundaries of the thirteen school districts previously existing. This report was accepted, and recorded at length, and the boundaries of the several school districts established accordingly, by a vote of the town.

On the 14th of May, 1847, a meeting of the new district established on the 26th of April preceding was held, at which the district was organized by the choice and qualification of the necessary officers; the clerk was directed to purchase a book for records; the district voted to build a schoolhouse, and appointed a committee to determine the location and agree upon a plan; and fixed the mode of calling future meetings. On the 29th of May, another meeting of the district was held, at which the district voted to build upon a plan reported; to purchase a lot of land particularly designated and described; and chose a committee to fix the bounds and take a deed of the same. The committee had a deed prepared, which was executed by the grantor, and put into the hands of the committee, but not formally delivered. The

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proceedings of these meetings were never rescinded, by any act of the district, nor did the district ever hold any meetings afterwards.

The plaintiff was an inhabitant of the town of Athol, and for three years previous had resided and was then residing within the limits of school district number one, as established by the vote of the 11th of October, 1847, and in that part of the same which constituted the supposed new district established on the 20th of April preceding.

On the 25th of October, 1847, a meeting of district number one was held, at which the district was organized by the choice and qualification of officers, and voted among other things to raise the sum of $1600 for the purpose of building a school-house. This tax was afterwards duly assessed; and the portion thereof, which was assessed upon and paid by the plaintiff, was the sum sought to be recovered in this action. It was agreed that the tax was legally voted and assessed, and that the plaintiff was rightly assessed, if, upon the facts above stated, he was liable to be assessed at all.

B. F. Thomas, for the plaintiff.

N. Wood, for the defendants.

Fletcher, J. The districting of the town, in 1799, not being territorial, but merely of the persons named, was illegal and void. It has been fully settled, that the power given to towns by the statute of 1789, *c.* 19, § 2, to determine and define the limits of school districts, can be executed only by a geographical division of the town. *Withington* v. *Eveleth*, 7 Pick. 106; *Perry* v. *Dover*, 12 Pick. 206. But it was maintained in argument, that as the districts established in 1799 existed in fact, when the act of 1817 was passed, by which every school district in the commonwealth was made, for certain purposes, a body corporate, these districts by force of that act were established as legal districts. In support of this argument, the case of *Whitmore* v. *Hogan*, 9 Shep. 564, was cited. But that case is partially different from the present. In that case, the origin of the district, which was a very ancient one, did not appear; so that it might have had a legal

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origin, and was a territorial district; and it is of such districts that the court appear to speak.

The proceedings of the town of Athol in 1799, in setting off individuals by name, did not constitute legal districts, or what could properly be called districts at all; so that there were then in fact no districts to which the act of 1817 could apply. The act of the town on the 26th of April, 1847, to establish a new school district, was wholly illegal and void. By that act the town undertook to establish a single district, leaving all the rest of the town not districted. It is well settled, that a town can execute its power to form school districts only by a geographical division of the territory, and that the districts must be so constituted as to include all the inhabitants of the town. *Perry* v. *Dover*, 12 Pick. 206.

Great difficulty and injustice would be occasioned in raising money to build school-houses and defray other district expenses by a partial districting of the town. The districting by the town, in October, 1847, was legal and valid; being made in accordance with the provisions and regulations of law; the districts being territorial districts, and the whole territory of the town being included within them. The plaintiff, being afterwards duly taxed in a district so rightfully established, was legally taxed, and has no legal right to recover back the money. *Judgment for the defendants.*

GEORGE FITCH *vs.* JAMES CHANDLER.

The defendant having received several demands from a debtor of the plaintiff, and agreed to collect the same, and, out of the proceeds, to pay four certain creditors of such debtor, of whom the plaintiff was one, their several claims, and having collected one of the demands; but it not appearing how large the claims were which the defendant was to pay, or whether either of them was entitled to priority, or had been paid, or to what sum the demands left with the defendant for collection amounted, or that he had collected any other than the one named; it was held, in an action of assumpsit on the money counts to recover the amount so collected, that the plaintiff must show either that the defendant had received the same under an agreement to appropriate it specifically to the plaintiff's debt, or that he had collected enough to pay all the demands which he had assumed to pay.

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Fitch v. Chandler.

This was an action of assumpsit, on the money counts only, and was brought to recover the sum of $8, which the plaintiff alleged had been paid to the defendant by a debtor of the plaintiff, with an agreement that the defendant should pay the same in behalf of such debtor to the plaintiff.

On the trial, which was before *Hoar*, J., in the court of common pleas, the plaintiff introduced evidence tending to prove, that the defendant had received several demands, in favor of the debtor and from him (on his leaving for the south), against divers individuals, which he, the defendant, agreed with such debtor to collect, and to pay out of the proceeds to four certain creditors of said debtor their several demands, among whom was the plaintiff.

The plaintiff further proved, that the defendant had collected one of the demands, amounting to the sum of $9·25, before this action was brought.

There was no evidence how large the demands were which the defendant was to pay, or that either of them was entitled to any priority, or had been paid; or to what sum the demands left with him for collection amounted, or that he had collected any other than the one named.

The court charged the jury, that in order to maintain the action upon these facts, the plaintiff must satisfy them that the defendant had received this sum of $9·25 under an agreement to appropriate it specifically to the plaintiff's debt, or else that he had collected enough to pay all the demands which he had assumed to pay.

The verdict was for the defendant, and the plaintiff excepted.

G. R. M. Withington, for the plaintiff.

There was no appearance for the defendant.

Metcalf, J. The plaintiff proceeds on the ground that his debtor placed funds in the defendant's hands, with an agreement between the defendant and the debtor, that the defendant should pay the plaintiff the amount of his claim on the debtor. This, if proved, constitutes a good cause of action against the defendant; the agreement being by simple contract. *Arnold* v. *Lyman*, 17 Mass. 400.

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Is the alleged cause of action proved? The plaintiff, at the trial, offered evidence that his debtor had put demands into the hands of the defendant, for collection, which the defendant agreed to collect, and to pay, from the proceeds, four creditors (of whom the plaintiff was one) their respective demands. The only demand, which the plaintiff proved that the defendant had collected, was one of $9·25. But there was no evidence to show the amount of the demands which the defendant was to collect, or of the demands which he was to pay. Nor was there any evidence that the defendant had paid either of the demands which he agreed to pay, or that either of those demands was entitled to any priority. The court thereupon instructed the jury, that the plaintiff's action could not be maintained, unless the plaintiff received the $9·25 under an agreement to appropriate it specifically to pay the debt due to the plaintiff, or unless the defendant had collected sufficient to pay all the demands which he assumed to pay.

We are of opinion that this instruction was right. What is the plaintiff's claim? It is the whole of his debt. But as he has no priority, and as the defendant has not collected enough to pay all the creditors, it would be not only unjust, but also contrary to the intention of the parties, that the plaintiff should receive his whole claim, and leave $1·25 only in the defendant's hands, for the other creditors. Each of those creditors might as well have brought this action, as the plaintiff.

If the sum in the hands of the defendant, after he shall have finished the collection, is less than the demands which it was intended to discharge, the four creditors may probably be entitled to payment *pro rata*. But this need not be decided now.

It was argued for the plaintiff, that it might be presumed, from lapse of time, that the defendant had collected all the demands that were put into his hands. But the proof is only that he has collected one of them; and the exceptions do not show what time elapsed between the putting of the demands into the defendant's hands and the commencement of this

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action. So that if such a presumption could ever be raised, it cannot be raised in this case, at this stage of it. And if the negligence of the defendant, in not collecting the demands, were the gravamen, the declaration should be framed accordingly, in a special count. *Exceptions overruled.*

Margaret Henry's Case.

Where a mortgagor dies in possession of the mortgaged premises, he is sufficiently seized thereof at the time of his death, to entitle his widow to an assignment of dower therein, upon a petition to the probate court, under the Rev. Sts. *c.* 60, § 3.

The widow of a mortgagor of real estate, who has released her dower therein, is nevertheless entitled to have dower assigned to her in the mortgaged premises, (the mortgage debt still subsisting), upon a petition to the court of probate therefor, under the provisions of the Rev. Sts. *c.* 60, §§ 2, 3; provided the mortgagor died seized, and neither the mortgagee nor the heirs or devisees of the mortgagor object to such assignment.

This was an appeal from a decree of the judge of probate, disallowing the petition of the appellant for an assignment of dower in a tract of land in Worcester, of which the petitioner alleged that her husband, Patrick Henry, died seized, and in which she was entitled to dower.

The decree appealed from was as follows: "On hearing the petition aforesaid, it appeared that the tract of land therein set forth was conveyed in fee and in mortgage by the said Patrick Henry, during his coverture with the petitioner, she joining her husband in the mortgage deed and relinquishing her dower therein; that the mortgage debt is still due and unpaid and the mortgage in full force; that the administrator upon the estate of said Patrick Henry is the mortgagee, and made no objection to the assignment of dower in the whole estate, the residue being of sufficient value to pay the mortgage debt; neither did any person object as heir or devisee; upon the facts aforesaid, I decline assigning dower in said tract of land, and decree that the petition be dismissed."

The appellant assigned as reasons of appeal: "1st. Because the facts stated in said decree do not furnish a legal

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reason why the judge should refuse to exercise jurisdiction over the subject matter of said petition, and ought not to prevent the said Margaret from having her dower assigned pursuant to her said petition; 2d. Because the judge decreed, that her said petition be dismissed; whereas he ought to have decreed, that the prayer thereof be granted, and that her dower should be assigned accordingly."

S. M. Burnside, for the appellant, referred to Rev. Sts. *c.* 60, §§ 2, 3; *Sheafe* v. *O'Neil*, 9 Mass. 9; *Gibson* v. *Crehore*, 3 Pick. 475; *Gibson* v. *Crehore*, 5 Pick. 146, 149; *Eaton* v. *Simonds*, 14 Pick. 98, 103; *Messiter* v. *Wright*, 16 Pick. 151.

WILDE, J. This was a petition to the judge of probate by the appellant, for the assignment of her dower in a certain tract of land, of which her husband, Patrick Henry, had died seized. At the hearing of the petition in the probate court, it appeared that the tract of land described in the petition had been conveyed by the said Patrick Henry in fee and in mortgage, and that the petitioner joined with her husband in the mortgage deed, and relinquished her right of dower therein. But it also appeared, that the administrator upon the estate of the said Patrick Henry was the mortgagee, and made no objection to the assignment of dower in the whole estate, the residue being of sufficient value to pay the mortgage debt; neither did any person object as heir or devisee to such assignment.

Upon these facts, the judge of probate declined assigning dower as prayed for, and ordered the petition to be dismissed. The ground of decision is not stated; but it must have been either because, in the opinion of the judge of probate, the petitioner was not entitled to dower, or because the case was not within the jurisdiction of the court of probate. As to the first question, it is very clear that the appellant is entitled to dower, as against every person except the mortgagee and those claiming under him. It is so expressly provided by the Rev. Sts. *c.* 60, § 2, and she may, at her election, have her dower assigned to her according to the value of the estate, after deducting the mortgage debt; or it may be assigned to her in the whole estate, "provided, that if the heir, or other

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person, claiming under the husband, shall redeem the mortgage, she shall repay such part of the money paid by him, as shall be equal to the proportion, which her interest in the mortgaged premises bears to the whole value thereof."

Whether she would be liable to pay such proportion, should the mortgage be foreclosed, may be a question, which, however, is not raised on this appeal; whatever may be the appellant's future liabilities, she has the right to have her dower assigned to her in the whole estate, the mortgagee not objecting.

And this assignment, in the opinion of the court, the judge of probate had a right to make. By the third section of the same chapter, it is enacted, that "When a widow is entitled to dower, in lands of which her husband died seized, and her right of dower is not disputed by the heirs or devisees, it may be assigned to her, in whatever counties the lands may lie, by the judge of probate for the county in which the estate of the husband is settled." In the present case, the appellant's right to dower was disputed by no one; and her husband died seized of the estate in which dower is claimed, notwithstanding the mortgage.

The title of a mortgagor of real estate is peculiar; for although by the mortgage deed a conditional title to the whole estate passes, and, as between the mortgagor and the mortgagee, the latter becomes seized of the legal estate, yet, as the mortgage is intended only as security for a debt, the mortgage, as between the mortgagor and all other persons, is considered only as a pledge and an incumbrance, the mortgagor still remaining the owner of the estate. We are of opinion, therefore, that the appellant's husband did die seized of the mortgaged premises, within the meaning of the third section; and as neither the mortgagee, nor any other person, made any objection to the assignment, the judge of probate was authorized to order it to be made, as prayed for, and that it should have been so ordered and decreed.

Decree of judge of probate reversed.

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Welcome Farnum *vs.* Moses Buffum.

Where the acknowledgment of a deed is taken and certified by a notary public, his certificate need not be authenticated by his notarial seal.

The third section of *St.* 1848, *c.* 166, requiring that the advertisement of the time and place of sale of real estate taken for taxes shall, "in addition to the provisions contained in Rev. Sts. *c.* 8, § 25, contain a substantially accurate description of the rights, lots or divisions, of the real estate to be sold," is only explanatory of the statute referred to, under which a description, though not expressly required, was necessary, by which the owner might know what rights, lots or divisions were to be sold.

Where, in an advertisement of the time and place of sale of real estate taken for taxes, estates were described in these terms: "M. B. house and land," and "L. E. house, barn and one hundred and fifteen acres of land," L. E. being a tenant of M. B., but H. M. having at the time taken possession of the estates under a mortgage from M. B. to him; it was held, that H. M. was the owner, and that his name not being stated in the advertisement, there was no sufficient description within the Rev. Sts. *c.* 8, § 25, providing that where the name of the owner is not known to the collector, the advertisement shall state the amount of the taxes on the several rights, lots or divisions of the real estate to be sold.

In proving the posting of a notice, by the collector, of the time and place of sale of real estate taken for taxes, in some convenient and public place within his precinct, three weeks before the time of sale, as required by the Rev. Sts. *c.* 8, § 27, the time when such notice was posted must be fixed with certainty, and its contents must be sufficiently shown, in order to identify it with the notice required to be published by the twenty-fourth section of the same chapter.

This was a writ of entry upon a mortgage, to recover seizin and possession of several tracts of land situated in Blackstone, formerly Mendon, in this county, and was tried before *Hopkinson*, J., in the court of common pleas.

The mortgage on which the suit was founded was given by Henry S. Mansfield to Richmond Bullock, bearing date June 29th, 1844, and assigned by the mortgagee to the plaintiff on the 14th of August, 1847. These deeds were duly recorded, but it was objected by the defendant, that the registry of the deed of assignment was inoperative, because Henry Martin, a notary public in the state of Rhode Island, by whom the acknowledgment of the same was taken and certified, did not authenticate his act by a notarial seal. But the court overruled the objection. The demandant then proved that three of the four notes referred to in the condition of the mortgage were due, and there rested his case.

The tenant, having pleaded the general issue, and specified

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in defence a paramount title in himself to the demanded premises, by virtue of a sale and conveyance of the same for taxes, gave in evidence a deed from Abel Aldrich, deputy collector of Mendon, to George A. Aldrich, dated September 21st, 1843, of an estate called the Mansion house, and one acre of land, and another deed of the same date, between the same parties, of an estate called the Pitts farm, in the occupation of Loring Emerson, containing one hundred and fifteen acres. These two parcels of real estate, being a part of the demanded premises, were conveyed by George A. Aldrich, on the 1st of February, 1845, to the tenant, who claimed to hold the same against the demandant by the title so acquired. The consideration of the collector's deed of the Mansion house was $44·02, being $37·34, for the tax, and $6·68 for necessary intervening charges; and of the Pitts-farm $21·50, being $14·92 for the tax, and $6·58 for charges.

In order to show that the taxes, upon which these sales were made, were duly assessed and collected, the defendant produced in evidence the records of the town of Mendon, from which it appeared, that at a legal meeting of the inhabitants on the 7th of March, 1842, and in pursuance of sufficient articles in the warrant for that purpose, Stephen Taft was chosen and qualified as town clerk and treasurer; that it was voted that the treasurer be collector, with authority to appoint a deputy collector; that three assessors were chosen; that the meeting was adjourned to the first Monday of April, when the town voted to excuse the assessors chosen at the first meeting from serving, and chose three others who were duly sworn before proceeding to take the valuation and assess the taxes; and that it was then voted to raise the necessary sums for the repair of highways, for incidental charges, for the maintenance of the poor, and for the support of schools, amounting in the whole to $6900. Evidence was also introduced, on the part of the defendant, of the appointment in writing of Abel Aldrich, as deputy collector, by Stephen Taft, the treasurer and collector, on the 4th of June, 1842; that the deputy collector was duly sworn; and

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that both the deputy and the treasurer and collector gave bonds according to law.

The defendant then produced in evidence the records of the valuation and assessment made in 1842, from which it appeared, that notice was duly given by the assessors to the inhabitants to bring in lists of their polls and estates for valuation; that the above-mentioned real estate of the tenant was valued and assessed as already stated; that the valuation and assessment thereon were filed in the office of the assessors, before the taxes were committed to the collector; and that the taxes were so committed on the 16th of July, 1842. It also appeared, by the affidavit of Abel Aldrich, which was recorded by the town clerk on the 21st of September, 1843, at five minutes before twelve o'clock at noon, that the taxes in question were duly demanded of the tenant and of Emerson, on the 5th of October, 1842.

The notice of the collector's sale, which was introduced in evidence by the tenant, and proved to have been duly published three weeks successively in the Worcester Palladium, was in the following terms: —

"Collector's Notice. — The proprietors of the following described real estate in the town of Mendon are hereby notified, that the same is taxed in the tax list committed to the subscriber, deputy collector of taxes for said Mendon for the year 1842, as follows: —

Moses Buffum, house and land, $37·34. Loring Emerson, house, barn and one hundred and fifteen acres of land, $14·92. Enos Goss, (of Providence, R. I.) one half house, one half barn, and one half acre land, $2·28. And if no person shall appear, to pay said taxes on or before the 21st day of September next, I shall proceed to sell at the Coverdale Tavern, so called in said town of Mendon, at one o'clock, P. M., by public vendue, *so much of said real estate* as shall be necessary to discharge said taxes and all necessary intervening charges. ABEL ALDRICH, Deputy Collector.

MENDON, August 17, 1843."

The defendant (after having offered in evidence an affidavit of William H. Aldrich, recorded in the registry of deeds, within six months after the sale, to prove the posting up of notice thereof, in Mendon, which affidavit, not being indorsed on the original advertisement, or a copy of the same, was therefore rejected by the court) called Aldrich as a witness, who testified that notice of the sale was put up

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at the post office, and at the store of Davenport and Aldrich, in Mendon, he thought, in August, 1843; he was positive it was warm weather and the summer of that year; that he had searched for the original notice in the store and in the town clerk's office, but could not find it; that it was a notice for the sale of lands of Moses Buffum, Loring Emerson, and Enos Goss, for taxes, of which he made an affidavit at the time; and that the notice set forth the time and place of sale, but he could not, of his own recollection, state such time and place. The defendant then proposed to inquire of the witness, whether the notice posted at Davenport and Aldrich's store was identical in its contents with the notice advertised in the Worcester Palladium; but the court ruled that the witness could testify to such contents only from his own recollection.

Stephen Taft, called by the defendant, testified, that in 1842 he was town clerk of Mendon, and wrote for Abel Aldrich, the deputy collector, who signed and took the same, three notices, the form of which he copied from a book of forms, for the sale of certain estates for taxes, and the time and place of sale; that he could not tell what property of Buffum was described; that the Emerson place was described either wholly or in part; that this was at one o'clock in the afternoon, but whether in August or September, or what day of the month, he could not say; that it was at Coverdale's tavern, where the sale was made to George A. Aldrich, soon after one o'clock in the afternoon.

It was agreed, that the Pitts farm or Emerson place was one entire farm of one hundred and fifteen acres; and from a plan of the Mansion house estate, occupied by the tenant, that the same consisted of one entire tract of land of about twelve acres, divided by the Blackstone river and canal, with the mansion house and several other buildings and houses upon it, constituting a manufacturing establishment, which the tenant had occupied and carried on for several years, though two of the small houses and lots were frequently let to tenants who had nothing to do with the manufactory.

The defendant, in order to show that he was not estopped

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from setting up his title, under the sale for taxes, to a part of the demanded premises, gave in evidence his discharge under the bankrupt law of the United States, relating back to the 29th of November, 1842; also, a deed of conveyance of the premises in mortgage by the tenant to Henry S. Mansfield, dated August 27th, 1842; possession under the same by Mansfield on the 26th of December, 1842; a conveyance of the right of redemption by Dan Hill, the assignee of Buffum, to Wilder Holbrook, in June, 1844, in pursuance of a sale on the ninth of September, 1843; a subsequent release of the premises by Holbrook to Mansfield; and a deed of the same from Mansfield to Buffum.

Upon the whole case, thus proved, the presiding judge ruled that the tenant's title under the collector's sale was not sufficiently made out; and a verdict being thereupon rendered for the demandant for the whole of the demanded premises, the tenant alleged exceptions.

P. C. Bacon, for the tenant.

B. F. Thomas, for the demandant.

WILDE, J. The demandant's title in this case is derived from one Henry S. Mansfield by this deed of mortgage to Richmond Bullock, and by his deed of assignment to the demandant.

To this title, it was objected, at the trial, that the deed of assignment was inoperative, because Henry Martin, a notary public in the state of Rhode Island, taking the acknowledgment of it, did not authenticate his act by a notarial seal. This objection was overruled. And the first question is, whether it was rightly overruled.

By the Rev. Sts. c. 59, § 13, it is provided, that deeds of real estate may be acknowledged "before any justice of the peace in this state, or before any justice of the peace, magistrate, or notary public, within the United States, or in any foreign country."

The statute requires no notarial seal to the notary's certificate of the acknowledgment, and none, we think was necessary. The notary derived his authority from the statute, and it is no good objection to the validity of the certifi-

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cate, that by the common law or the law merchant, notaries public are required to certify their acts and doings under their notarial seals. *Hinckley* v. *O'Farrell*, 4 Blackf. 185; *Dumont* v. *McCracken*, 6 Blackf. 355.

But the principal questions, which have been discussed, depend on the validity of the tenant's title, which is derived from a sale and conveyance of the demanded premises by a deputy collector of the town of Mendon for the payment of taxes. To this title several objections have been made, as to the assessment of the taxes, and as to the proceedings of the deputy collector in making the sale. But as to the objections to the assessment of the taxes we have not found it necessary to express an opinion; as we are satisfied, that the proceedings of the deputy collector, in making the sale, were not conformable to some of the requisites of the statute. Rev. Sts. *c.* 8, §§ 18, 24, 25. By the eighteenth section, it is provided, that sales for the non-payment of taxes assessed on the real estates of resident proprietors shall be conducted in the same manner as that provided for the sale of lands of non-resident proprietors; and by the twenty-fourth and twenty-fifth sections it is provided that the collector, in such cases, shall give notice of the time and place of sale, by an advertisement thereof in some newspaper, which shall state among other things the names of the owners, if known to the collector; and where the owners are not so known, the advertisement is to state the amount of the taxes on "the several rights, lots, or divisions of the real estate to be sold."

In the present case, the name of the owner was not stated in the advertisement. Before the sale, Mansfield, the mortgagee, had taken possession and was to be considered as the owner. Rev. Sts. *c.* 7, § 7. But it has been argued for the tenant, that it does not appear that the collector had notice of the entry of the mortgagee, and that it is to be presumed that he had not; that the description of the lots sold was not required by the Rev. Sts. *c.* 8, § 25; and that no such description was required until the statute of 1848, *c.* 166, § 3. But we consider the third section of the latter statute as explanatory of the former provision, in order to remove doubts, if

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any existed; and if it were not so intended, and the legislature supposed that no such description was required by the twenty-fifth section of the Rev. Sts., *c.* 8, we cannot concur in that opinion. Some description of the lots to be sold was required, or the notice would be of no use whatever. So as to rights and divisions, the question would be, What rights and divisions? and it must be answered by a full and satisfactory description, so that the owner might know what rights, lots, or divisions were to be sold. It was also argued, that if a description were necessary, a sufficient description was contained in the notice. The only description, if so it may be called, is, "Moses Buffum, house and land, and Loring Emerson, house, barn, and one hundred fifteen acres of land." This we consider a very uncertain description, and altogether insufficient. The owner's name not appearing in the notice, a full and clear description of the property to be sold should have been given.

Another objection to the validity of the sale is, that it does not appear that a similar notice was posted in some convenient and public place, as required by the twenty-seventh section. This objection, also, appears to the court well founded. William H. Aldrich, the witness who testified as to the time when a notice of the sale was posted, could not with certainty recollect the time. He thought it was in August. He was positive it was in warm weather, and in the summer. Taking this evidence together, it is manifest that the witness was only positive that it was in warm weather; for although he adds that it was in the summer, this must be understood as an inference from the fact that it was in warm weather; for he could not be positive that it was in August; and it is clear, that if it was not, it was not in the summer; for he refers to his affidavit, in which it was stated, that the notice was posted in August; but that affidavit was not admitted in evidence, but the witness no doubt had seen the affidavit, and he certainly had a right to examine it to refresh his recollection; yet he would not be certain, that the notice was posted in August.

Another defect in the evidence on this point is, that

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although the witness testified that the notice set forth the time and place of sale, yet he would not state the time and place from his recollection; and this defect is not supplied by the testimony of Stephen Taft, who wrote, as he testified, three notices for Aldrich, for it does not appear that any one of them was the one Aldrich put up at the post office. Aldrich did not testify that it was. It may be probable that it was; but probability is not sufficient.

But it has been argued for the tenant, that although the evidence as to the notice was weak, it should have been submitted to the jury; but, we think, if it had been so submitted, and a verdict had been found for the tenant, we should be bound to set it aside as a verdict against evidence. There was no such description of the property sold as the law requires in the notice published in the newspaper; and the evidence of posting a notice is insufficient, both as to the time when it was posted, and as to the contents of the notice.

In a sale like this, where a large and valuable property has been sold for a mere trifle, a compliance with all the provisions of the statute should be proved with great certainty in every particular; and one of the most important particulars is the notice to the owner, when he is a non-resident, or, as in the present case, where the tax was not assessed to the owner at the time of the sale. These objections, therefore, to the tenant's title fully sustain the rulings of the court at the trial. *Exceptions overruled.*

PATRICK HENNESSEY *vs.* DANIEL FARRELL & another & Trustees.

CALVIN WHITE *vs.* DAVID BUTTERMORE & Trustees.

If several persons are summoned as trustees, on the ground of a joint liability, and one of them answers for himself and the others, jointly, and states the joint account between the parties, the answer is *prima facie* sufficient; and if the plaintiff, for any cause, desires to have the sworn answers of all, he should object to the answer of a single one at the time it is made, and move the court to require the others also to answer.

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Hennessey v. Farrell & another & Trustees.

A contract for building and grading a section of a railroad provided, that for the services performed under the contract, the contractor should be paid monthly, upon a certificate by the engineer of the road of his estimate of the work done three fourths of the same, one fourth being retained until the work should be completed, and accepted by the engineer; and that in a certain contingency, the employer might determine the contract to be abandoned by the contractor, in which event the contract should be void, and any balance due the contractor should be forfeited to the employer: after the contractor had performed one month's service, and part of a second, and had been paid three fourths of the first, the employer determined that the contract had been abandoned by the contractor. It was held, that nothing was due from the employer to the contractor.

In these cases, in which the only question was, whether the supposed trustees, Patrick O'Keefe, John Healey and John T. Cahill, were chargeable as such, it appeared, from their answers, which were stated by one of them for himself and the others, that having entered into a contract to build and grade the South Shore railroad, they let out the building and grading of one section thereof to the defendants, to be done by them in the most substantial and workmanlike manner, and to the satisfaction and acceptance of the engineer of the railroad, and completed on or before the 15th of July, 1848.

It was agreed between the parties, that if it should appear to the engineer that the work was not carried on with sufficient rapidity, and was not likely to be completed within the time, the contractors above mentioned, the supposed trustees, might employ other help at the expense of the defendants, or the contractors should have the right to determine that the contract had been abandoned by the defendants; and that in the event of any such determination, the agreement on the part of the contractors should become null and void, and any balance of money should be forfeited by the defendants to the contractors.

It was further agreed, that between the first and tenth day of each month after the commencement of the work, the engineer should estimate the quantity of work done, and give a certificate thereof to the defendants; that on condition of the fulfilment of the agreement on their part, the contractors should pay the defendants seventy-five per cent of all work performed as estimated by the engineer, monthly, and should

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retain the remaining twenty-five per cent until the work should be completed and accepted; and that when the whole section should be completed and accepted, according to contract, the balance due should be paid to the defendants.

It appeared, also, that the defendants having failed in the performance of the contract on their part, the contractors determined that the same had been abandoned, according to the stipulation above mentioned. At the time of this determination, the defendants had completed one month's work, for which they had been paid, according to the contract, seventy-five per cent, amounting to $401·58. They had also worked a part of a second month, but the work had not been estimated by the engineer. Deducting one quarter from the amount of the second month's work, as stated by the supposed trustees, the balance in their hands for that month was $262·51. The quarter part of the whole work done by the defendants, together with the said balance of the second month's work, the supposed trustees contended, by their answers, was forfeited to them, on the ground, that "the defendants abandoned their work and failed to perform their contract."

The cases came by appeal to this court, where they were argued in writing by *F. Hall*, for the plaintiffs, and *J. C. B. Davis* and *S. B. I. Goddard*, for the trustees.

Shaw, C. J. A preliminary exception is taken by the plaintiffs in their argument, that three trustees are summoned, and one only has answered.

In examining the case, it appears, that the plaintiff seeks to charge the three trustees on a joint liability from them to the principal defendants; that one has answered for himself and the other two, jointly, and stated the joint account. We think this is *prima facie* sufficient; especially when no exception appears to have been made to the sufficiency of the answer before it was submitted to the court for adjudication. If, for any cause, the plaintiff desired to have the sworn answers of all the trustees, he should have excepted at the time, and appealed to the court, to require of the trustees a better answer.

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Upon the answer, which must be taken to be true, we think the trustees are entitled to be discharged. The question is, whether any thing was due from the trustees to the principal defendants, at the time of the service of the writ, either then payable, or payable afterwards, absolutely, and not depending upon any contingency.

It is argued for the plaintiffs, that the trustees admit a certain sum named as a debt due to the defendants, but claim it as a forfeiture. We do not so understand their answer; on the contrary, the facts stated by them show that nothing was due from them, at the time of the service; and by force of the contract, under which the work was done by the principal defendants, nothing would be due now. What they do admit is, that they were under a contract with the principal defendants, by which, had it been performed, the defendants would have been entitled to the sum named; but they deny that it was so fulfilled. Upon the facts stated, the court are of opinion that there was nothing due.

As to part of a month's work, not completed, nothing had been earned. By the terms of the contract, it was entire for each month, and unless the work was continued to the end of the month, the defendants were not entitled to have an estimate made by the engineer.

As to the one quarter part of the nominal amount earned in former months, it was payable only upon the completion of the entire work contracted to be done, and as this never was done, this quarter part therefore never became a debt due, which could be charged by the trustee process.

Trustees discharged.

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4c 270
175 259

SAMUEL G. PALMER & another *vs.* HENRY H. DAYTON.

The appeal, authorized by the *St.* of 1838, *c.* 163, § 4, from the decree of the commissioner of insolvency, rejecting or allowing the claim of a supposed creditor, must be entered "in the proper court which shall be first held within and for the county in which the proceedings are had, next after the expiration of fourteen days from the time of claiming the appeal;" and if omitted to be so entered, through forgetfulness or mistake, cannot be entered at a succeeding term

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Palmer & another v. Dayton.

This was a petition for leave to enter an appeal from a decree of the commissioner of insolvency for this county at the present term of the court.

The petitioners alleged, that they were the assignees of Goodrich M. Dayton, an insolvent debtor; that on the 23d of December last, the respondent presented a claim against the estate of the insolvent, which was allowed by the commissioner, to the amount of $1752·78; that being dissatisfied with such allowance, the petitioners appealed to this court then next to be holden in this county on the third Tuesday of April last; that the petitioners' counsel, "through forgetfulness and mistake" neglected to enter the appeal at the April term; and that, according to their belief, the claim so allowed was unjust, and ought not to have been proved against the estate of the insolvent. The statements in the petition were not controverted.

R. Newton, for the petitioners, referred to the *St.* 1838, *c.* 163, § 4; *Davis* v. *Newton*, 6 Met. 537; *Eastman* v. *Foster*, 8 Met. 19; and *In Re Decoster*, 7 Law Reporter, 189.

B. F. Thomas, for the respondent, referred to the same section of the *St.* of 1838, and to *Dean* v. *Dean*, 2 Mass. 150.

Wilde, J. This is a petition of the assignees of an insolvent debtor, to enter an appeal from the allowance, by the commissioner of insolvency, of the respondent's claim against the estate of the insolvent. The appeal was not entered at the term of this court next after the expiration of fourteen days from the time of claiming the appeal, as is required by the *St.* of 1838, *c.* 163, § 4, and it is very clear that the court has no power to allow the appeal to be entered at any other term. Provisions are made in other cases authorizing courts on petition to allow the entry of appeals, where, by mistake, they had not been entered at the proper term; but there is no such provision in the insolvent laws for the allowance of the entry of an appeal from the allowance by the commissioner of insolvency of a creditor's claim.

It has been argued for the petitioners, that they are entitled to relief by virtue of the eighteenth section of the

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statute; but we think otherwise. If the petitioners were aggrieved by the decision of the commissioner, their only remedy was by appeal; and that was a convenient and adequate remedy. And they would not have been entitled to relief, we apprehend, under the eighteenth section, although it should appear on the face of the proceedings, that the commissioner had allowed an illegal claim. That section was not intended to apply to cases which were otherwise specially provided for in the fourth section. *Davis* v. *Newton*, 6 Met. 537, 543. That section gives this court chancery jurisdiction, but not in cases where a party has a complete and adequate remedy at law. In the case of *Savage* v. *Gulliver*, 4 Mass. 171, and in sundry other cases, it was decided, that a writ of error does not lie on a judgment of an inferior court, where the party aggrieved has a right of appeal to a superior court. And this case would depend on similar principles, if the proceedings of the commissioner had been irregular and illegal. It is not necessary, however, to decide this point, for it is quite clear that the commissioner acted within his jurisdiction. He had a right, and was bound, to allow all claims of creditors, which in his opinion were proved; and it does not appear, nor is it suggested, that any question of law was involved in the allowance of the respondent's claim.

Petition dismissed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF MIDDLESEX, OCTOBER TERM 1849, AT CAMBRIDGE.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE,
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. RICHARD FLETCHER,
} JUSTICES.

[The cases, with the exception of the first three, as far as page 351, were argued at the term in October; the remainder at the sittings in Boston, in February, 1850.]

WARREN B. AUSTIN & Wife *vs.* JOHN WILSON & Wife.

If exemplary, vindictive, or punitive damages are ever recoverable, in any case, they cannot be recovered in an action for an injury which is also punishable by indictment.

Where an action is brought against husband and wife for a libel by the wife, no smaller damages are to be assessed than would be legally recoverable if the libel had been published by her, while sole, and the action had been against her alone.

THIS was an action on the case for a libel by the female defendant upon the female plaintiff, and was tried before *Wells*, C. J., in the court of common pleas.

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On the question of damages, the court instructed the jury, that as by law a husband is only liable civilly for the acts of his wife, and is not responsible therefor criminally; and as the judgment on the verdict (if rendered for the plaintiff) would be as well against the husband as the wife; the damages must be limited, in the present case, to a compensation for the injury sustained; and that this was not a case, in which exemplary or punitive damages could be given.

In explanation of this instruction, it was further stated to the jury by the court, that the term "compensation" included a remuneration for all the injury which the plaintiffs had sustained, whether a pecuniary loss, or an injury to the feelings or reputation; and that so far as the actual malice of the defendant who made the publication, if proved, had a tendency to explain or give more force to the evidence, it might be taken into account for this purpose, but no further; and, by the term "exemplary" or "punitive" damages was meant such sum, as in some cases, juries awarded against a defendant, as an example to deter others from similar acts, or as a punishment upon him for the act which was the subject of the action.

The jury, under these instructions, returned a verdict for the plaintiffs, with $30 damages, and the plaintiffs thereupon alleged exceptions.

This case was argued at the sittings in Boston in January last, by *B. F. Butler*, for the plaintiff, and *J. G. Abbott*, for the defendant.

Metcalf, J. We are of opinion that the jury were rightly instructed that the damages, in this case, must be limited to a compensation for the injury received. Whether exemplary, vindictive or punitive damages — that is, damages beyond a compensation or satisfaction for the plaintiff's injury — can ever be legally awarded, as an example to deter others from committing a similar injury, or as a punishment of the defendant for his malignity, or wanton violation of social duty, in committing the injury which is the subject of the suit, is a question upon which we are not now required nor disposed to express an opinion. The arguments

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and the authorities on both sides of this question are to be found in 2 Greenl. on Ev. tit. Damages, and Sedgwick on Damages, 39 *et seq.* If such damages are ever recoverable, we are clearly of opinion that they cannot be recovered in an action for an injury which is also punishable by indictment; as libel and assault and battery. If they could be, the defendant might be punished twice for the same act. We decide the present case on this single ground. See *Thorley* v. *Lord Kerry*, 4 Taunt. 355; *Whitney* v. *Hitchcock*, 4 Denio, 461; *Taylor* v. *Carpenter*, 2 Woodb. & Min. 1, 22.

We do not hold that smaller damages ought to have been assessed, in this case, than would have been legally recoverable if the libel had been published by the wife, while sole, and the action had been against her alone. A husband is liable for his wife's acts, when liable at all, to the same extent as if she alone were answerable. *Exceptions overruled*

THE CITY OF LOWELL *vs.* PATRICK SHORT.

4c 275
159 319

A town, which has been compelled to pay damages for an injury from a defect in a highway, occasioned by a nuisance placed therein by an individual, may recover of the latter the damages so paid, to the amount of single damages only, in an action on the case.

THIS was an action on the case tried before *Wells*, C. J., in the court of common pleas. The declaration set forth, that on and before the 11th of August, 1842, there was a public highway in Lowell called Gorham street, which the plaintiffs were bound by law to keep in repair, and safe and convenient for travellers; that on the 9th of said August, the defendant wrongfully and unlawfully placed and deposited a large pile of earth, stones and gravel in said street, occupying one half of the width thereof, and making the same dangerous and inconvenient to travellers, and suffered the said pile to remain there for the space of forty-eight hours, without guards, lights, or barriers; that, afterwards, to wit, on the 11th of said August, in the right time, and while the

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street was so incumbered and obstructed, one William Smith, travelling over the said street, and using all due care and skill, struck against the pile above mentioned, whereby his carriage and horse were overturned, and he was thrown out, and greatly injured in his person and property; that he afterwards brought his action against the plaintiffs, for the injury sustained by him, and recovered judgment therein against the plaintiffs for double damages, in the sum of $200, and costs; that the defendant had due notice of the premises, and had been called upon, before the commencement of this action, to indemnify the plaintiff, but had wholly refused to pay the said judgment, or any part of it; and that the same had been paid by the plaintiffs.

It having been proved or admitted, that Smith recovered judgment as above stated, and that it was paid by the plaintiffs, and that Gorham street was a public highway which the plaintiffs were bound to repair; and that the plaintiffs demanded indemnity of the defendant before bringing this suit, the plaintiffs then offered to prove, that the defendant, without any authority or license, piled or caused to be placed a large quantity of gravel, earth and stones in the street, and suffered the same to remain there, as set forth in the writ; and that while the same remained there, and the street was thereby incumbered and made unsafe, said Smith was injured in the manner described in the declaration, and without any carelessness or negligence on his part. This evidence being objected to, the presiding judge ruled that it was not admissible, and that the facts which it purported to prove were insufficient in law to sustain the action; whereupon a verdict was returned for the defendant, and the plaintiffs alleged exceptions.

The case was argued at the sittings in Boston in January last.

S. Ames, city solicitor, (with whom was *B. F. Butler*), for the plaintiffs, relied upon the case of *Lowell* v. *Boston & Lowell Railroad Corp.* 23 Pick. 24, as decisive of the present case. They also referred to *Bush* v. *Steinman*, 1 B. & P. 404; *Waggoner* v. *Jermaine*, 3 Denio, 406; and *Bailey* v. *New York*, 2 Denio, 433; S. C. 3 Hill, 531.

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J. G. Abbott, for the defendant, cited *Wood* v. *Waterville*, 4 Mass. 422, and 5 Mass. 294; *Griswold* v. *Waddington*, 16 Johns. 438, 487; *Morck* v. *Abel*, 3 B. & P. 35, 38; *Drew* v. *New River Co.* 6 C. & P. 754.

By the court. This case appears to us not to be distinguishable from the case of *Lowell* v. *Boston & Lowell Railroad Corp.* 23 Pick. 24. The defendant created the nuisance, and thereby exposed the plaintiff. The parties were not *in pari delicto;* they were not respectively chargeable in the same default. The claim of the plaintiffs, if they recover, must be limited to single damages only, according to the rule in the case cited. *Exceptions sustained*

The City of Lowell *vs.* Thomas Spaulding.

Where a town was compelled to pay damages, for an injury resulting from a defect in a highway, occasioned by the want of repair of a cellar way constructed in the sidewalk, and leading to a building adjoining thereto, which was in the occupation of a tenant; it was held, that the occupant and not the owner was liable to the town for such damages. But if, in such case, there had been an express agreement between the landlord and tenant, that the former should keep the premises in repair, then to avoid circuity of action, the landlord would be liable in the first instance.

4c 277
146 48
146 50
4c 277
160 271
4c 277
176 200

This was an action on the case to recover of the defendant the sum of $2800, paid by the plaintiffs for an injury caused by a defect in a public highway, which was occasioned, as the plaintiffs alleged, by the negligence of the defendant. The trial was before *Metcalf*, J.

The declaration alleged, that the defendant constructed a passage way across Merrimack street, a public highway in Lowell, which the plaintiffs were bound by law to keep in repair; which passage way was of the depth of ten feet and of the width of eight feet, and led to the cellar of a building belonging to the defendant, and abutting on Merrimack street; and that the defendant suffered the platform or covering of the passage way to be and remain out of repair, and in an insecure and dangerous condition, in consequence

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of which two persons, while passing on foot through Merrimack street in the night time, fell into the passage way and received injuries, for which the plaintiffs were sued and obliged to pay damages and costs; and that the defendant had been requested to indemnify the plaintiffs, but had refused so to do.

The presiding judge ruled, that upon the facts set forth in the declaration, if proved, the plaintiffs would not be entitled to recover; but suffered the case to proceed, and evidence to be introduced, on the part of the plaintiffs, to be reported for the consideration of the whole court.

Among the facts in evidence, it is only material to state, that the defect mentioned in the declaration was a cellar way leading into the cellar of a house owned by the defendant, and occupied by his tenants; that the cellar way extended into the sidewalk of Merrimack street, about eight feet from the building, and was about six feet wide; that the door covering it had become loose, so that a person stepping on one part of it might be precipitated into the cellar; that the accident complained of happened in that way; and that the defendant did not live in Lowell at the time the accident happened.

The case was argued at the sittings in Boston, in January last.

S. Ames, city solicitor, for the plaintiffs.

J. G. Abbott, for the defendant.

Shaw, C. J. The city of Lowell, having been obliged to pay damages to a party injured through a defect in one of the highways therein, arising from the want of repair of a sidewalk, now seek their remedy to recover single damages of the defendant, as the owner of the estate, the sidewalk of which was defective. This case would be similar in principle to the case of *Lowell* v. *Short*, next preceding, if the defendant was bound to repair. But it appears from the facts stated, that the defendant had only a reversion in the estate, and that the tenements were in the actual occupation of his tenants.

By the common law, the occupier and not the landlord is

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bound, as between himself and the public, so far to keep buildings in repair, that they may be safe for the public; and such occupier is *prima facie* liable to third persons for damages arising from any defect. *Regina* v. *Watts*, 1 Salk. 357; S. C. 2 Ld. Raym. 856; S. C. 3 Ld. Raym. 18; *Cheetham* v. *Hampson*, 4 T. R. 318. If, indeed, there be an express agreement between landlord and tenant, that the former shall keep the premises in repair, so that in case of a recovery against the tenant, he would have his remedy over, then to avoid circuity of action, the party injured by the defect and want of repair, may have his action in the first instance against the landlord. *Payne* v. *Rogers*, 2 H. Bl. 350. But such express agreement must be distinctly proved. *Judgment for the defendant.*

SAMUEL BEAN *vs.* HUGH GREEN.

The writ and process, to which alone the power of quashing is applicable, may be quashed for defects therein, but not for defects in the declaration.

In an action of trespass, for an injury to the plaintiff's cattle, without taking or converting them, the averment of value is not material. If it were, the want of it could only be taken advantage of by special demurrer, and is therefore cured by the statute of 1836, *c.* 273, § 3, by which special demurrers are abolished. Such defect would also be cured as a circumstantial error, by the Rev. Sts. *c.* 100, § 21.

THIS was an action of trespass originally brought in the justice's court of the city of Lowell, for chasing, beating and wounding a cow and heifer, the property of the plaintiff. The declaration was as follows:—

"In a plea of trespass, for that the said defendant, at said Lowell, heretofore, to wit, on the first day of October current, with force and arms, chased, beat, and worried a cow of the property of the plaintiff, and a heifer, also of the proper goods and chattels of the plaintiff, and thereby greatly damaged said cow and said heifer, against our peace; also, for that said defendant, heretofore, to wit, at said Lowell, on the first day of October aforesaid, with force and arms, chased, beat,

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bruised, and worried a certain other cow and heifer, both of the proper goods and chattels of the plaintiff, and thereby wounded and hurt said cow and said heifer, and otherwise greatly injured and damaged said cow and heifer, to wit, to the value of twenty dollars, against our peace, and to the damage of the said Bean, as he says, the sum of twenty dollars, as shall then and there appear, with other due damages."

The defendant moved, before the justice, that the writ should be quashed, on the ground, that the writ and declaration were insufficient in law, because no value was alleged therein to the property alleged to be injured. The justice allowed the motion, and gave judgment for the defendant for his costs; whereupon the plaintiff appealed to the court of common pleas. The defendant, in that court, before *Wells*, C. J., renewed his motion to quash the writ, for the reason above stated; which motion being allowed, and the writ quashed accordingly, the plaintiff alleged exceptions.

B. Dean, Jr., and *J. Dinsmore*, for the plaintiff.

B. F. Butler, for the defendant, referred to 1 Chit. Pl. 410, 411; Steph. Pl. 347; *Bertie* v. *Pickering*, 4 Burr. 2455; *Reading* v. *Clarke*, 4 B. & Ald. 268, 271; Bac. Ab. Trespass, I.

By the court. We think the exceptions must be sustained, and the order quashing the writ reversed, for several reasons. When the action is not for taking or converting the cattle, but only for damage to them, the averment of value is not material. The case cited, in which a declaration was held bad on special demurrer, for want of an averment of value, was *indebitatus assumpsit* for tolls payable in kind, and the value was material. *Reading* v. *Clarke*, 4 B. & Ald. 268. But if it were otherwise, it would be bad only on special demurrer, and the right to demur specially is taken away by statute 1836, *c.* 273. Besides, the defect is cured by statute, providing that no writ shall be quashed for any circumstantial error, when the person and case may be rightly understood by the court. Rev. Sts. *c.* 100, § 21.

But further, the power of quashing applies to the writ and

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process only; the writ cannot be quashed for any defect in the declaration. The judgment of the court of common pleas quashing the writ must be reversed, and the case remanded for further proceedings.

THE ELDER AND DEACONS OF THE FIRST FREEWILL BAPTIST CHURCH IN LOWELL *vs.* JEFFERSON BANCROFT.

Where an action of trespass *de bonis asportatis* was brought in the name of the elder and deacons of a church, and it appeared, upon the report of an arbitrator to whom the action was referred, that the property, in respect of which it was brought, had been purchased with funds belonging to the church, and in the name of the church, or had been given or otherwise granted to the church, and that the elder had not been joined or named in any deed or grant relating thereto; it was held, that the deacons alone constituted the corporation with respect to such property (Rev. Sts. *c.* 20, §§ 39, 40), in whose name the action should have been brought, and that the writ might be amended in this court, by striking out the words "elder and", under the several statute provisions authorizing amendments.

IN this case, the material facts are stated in the opinion of the court.

R. B. Caverly, for the plaintiffs.

B. F. Butler, for the defendant.

FLETCHER, J. This is an action of trespass *de bonis asportatis*, and was referred to an arbitrator, from whose award it appears, that, at the time of the trespass complained of in the writ, there was at Lowell a religious body or society known as "The First Freewill Baptist Church in Lowell," having as its customary officers an elder and four deacons; the elder being the pastor, and thus his office distinct from that of deacon.

The property taken by the defendant had been purchased with funds belonging to the church, and in the name of the church, or had been given or otherwise granted to the church; but the elder had never been joined or named in any deed or grant. This property consisted of carpets, cushions, and other furniture of the meeting-house, used by the church as place of worship. These articles of furniture having been

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taken away by the defendant, this action of trespass was brought by the church to recover damages, and was referred as before stated.

At the hearing before the arbitrator, it was objected by the defendant, that the action could not be maintained by the elder and deacons, but should have been in the name of the deacons alone; as by the Rev. Sts. *c.* 20, §§ 39, 40, the deacons alone are to sue, unless in cases of grants or donations where the elders, ministers, &c., are expressly joined with the deacons; and as the elder was not joined in any grant or donation of the property sued for, the suit should have been in the name of the deacons without joining the elder. This objection was very correctly sustained by the arbitrator, and the award is accordingly made with a double aspect; finding for the defendant his costs, as the case now stands, and finding the value of the property, in case the plaintiffs should have leave to amend by striking out the name of the elder.

The plaintiffs now move to amend by striking out the words "elder and", thus leaving the deacons alone as the party plaintiff. The defendant objects to the amendment, and the question which has been submitted to the court is, whether or not this amendment shall be made.

The ground of the objection to the amendment is, that by the Rev. Sts. *c.* 20, § 40, it is provided, that when ministers, elders, &c., in grants and donations mentioned in the thirty-ninth section, shall be joined with the deacons, &c., as donees, such officers, with the deacons, &c., shall be deemed the corporation for the purposes of such grants and donations. To support the objection, it is assumed, that the party plaintiff here, the elder and deacons, are the corporate body constituted by the fortieth section; and then it is argued, that by striking out the words "elder and", a new corporation would be substituted as a party for the present corporation, and thus a new party substituted instead of the present party plaintiff.

The present action is in the name of the ordinary officers of the church, and it by no means follows, that because they have the same name as the persons who are by the fortieth section made a corporation for some purposes, and under

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some circumstances, that therefore this is a suit by that corporation.

Elder and deacons have a corporate capacity only in particular cases, of which the present case is not one; nor do the present plaintiffs claim to have any such corporate capacity, or to be a corporation, under the provisions of the fortieth section. Then it is said, that the proposed change would introduce a new party. But who is the real party? Certainly, the church is the real party, in interest, whether the suit be in the name of the deacons alone, or in the name of the elder and deacons. The infirmity of the argument for the defendant is, that it overlooks the fact, that there is but one real party plaintiff, that is, the church, whether the suit be in the name of the elder and deacons, or of the deacons; both being but trustees suing for and in behalf of the church.

The two sections (§§ 39, 40) of the statute referred to authorize actions in behalf of the church, sometimes in the name of the deacons, and sometimes in the name of the elder and deacons. The deacons, and the elder and deacons, are respectively but trustees for the church; and whether the suit be in the one name or the other, the church is the real party in interest.

It was said by the counsel for the defendant, that to make the amendment proposed would in effect be the same as if in a suit by the Lowell Bank, the word "Bank" should be struck out, and "Railroad" substituted, so as to introduce a new corporation with new and distinct rights and interests. The case put is like the case at bar only in the particular, that the amendment in each case would be made by striking out a single word; but in all other respects, the cases are wholly and most essentially different.

Suppose the bank charter provided, that, on notes made payable to the bank generally, suits should be in the name of the directors, and that on notes made to the president and directors, the suits should be in the name of the president and directors, and suppose a suit in the name of the president and directors, on a note made to the bank generally, in

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which case, it should have been in the name of the directors only, leaving out the president. Upon an application to strike out the name of the president, the same objection might be made as in this case, that it would be a change of party. But the suit would still be for the bank, for the same cause of action, and with precisely the same rights and interests. So, the defendants and their rights and interests would remain precisely as before.

It would certainly be most remarkable, if in this age of the law, after the various English statutes in favor of amendments, and the statutes of this commonwealth, the amendment supposed could not be made. So, in the case at bar, the amendment proposed leaves the real party plaintiff, and the cause of action, and every thing in relation to the plaintiff's claim and to the defendant and his liability, precisely as before.

It is therefore plain, that a reasonable and enlightened administration of justice requires that the amendment should be made, if this court has power to allow such an amendment.

That this court has the power can admit of no reasonable doubt. The power of the court, on this subject, is very much enlarged by the revised statutes. See the Rev. Sts. *c.* 100, §§ 21, 22. The twenty-first section is the old law, and the twenty-second section gives new and very enlarged power of amendment. The statute of 1836, *c.* 273, § 3, applies to amendments in the form of action. The statute of 1839, *c.* 151, § 2, applies to the particular case of striking out or adding the names of joint plaintiffs. There has never as yet been any judicial construction or exposition of the twenty-second section above referred to. In terms, it gives unlimited power: "The court, in which any civil action is pending, may, at any time, before judgment rendered therein, allow amendments, either in form or substance, of any process, pleading, or proceeding in such action, on such terms as shall be just and reasonable." Whether the power of amendment given to the court should in any respect be limited or restricted, it is not now necessary to decide. It is sufficient

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for the present purpose, that the statute very clearly gives power to make the amendment, which is a very peculiar one, in this case, where the real parties, cause of action, rights and liabilities, remain unchanged. The court having the power, it seems obviously proper that the amendment should be made. *Amendment allowed.*

WILLIAM CHANDLER & others *vs.* JOHN B. F. TEMPLE & others.

4c 285
168 246

The possession of an instrument, signed and sealed, in the hands of the party to whom it purports to be made, is *prima facie* and not conclusive evidence of delivery.

Where it appeared in evidence, in an action of debt, that the two parts of an indenture declared on were executed by the parties of the one part, and by some of the parties of the other part, with an agreement, that one of the latter, who had executed the instrument, should obtain the signatures of his coöbligors to one part, to be then exchanged for the other part, which such party was in like manner to get signed; and one part of the instrument was executed accordingly, but was never exchanged for the other, the execution of which was therefore not completed; it was held, that there was no sufficient legal delivery of the instrument, to make it the deed of the obligors named therein.

THIS was an action of debt on a contract under seal, tried before the chief justice of this court, and by him reported for the consideration of the whole court.

In order to prove the execution and delivery of the instrument declared on, which purported to be one part of an indenture of two parts, between the plaintiffs and the defendants, the plaintiffs called Baldwin Locke and Charles Whitney, Jr., two of the subscribing witnesses.

The first-named witness testified, that he was called into the store of Jonathan L. Parker, one of the plaintiffs, in Lexington, to witness the execution of the contract, and that he there saw the instrument, which had already been signed by the plaintiffs, and upon which he saw no interlineations, signed by the three defendants.

The other subscribing witness testified, that having gone from Watertown to Lexington with the defendants, he was

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in Parker's store and saw the defendants sign the instrument. Before signing, Parker read over the contract, and when he had finished, White, one of the defendants, observed that the names of Priest and Gilkey, who had agreed to become sureties with him and Gibbs, the other defendant, were not in the contract, and that he should not sign unless they were inserted. Gibbs also declined signing for the same reason. After some further conversation, Parker interlined the names of Priest and Gilkey in each part of the contract, which was thereupon signed by the three defendants.

It was then agreed, that the defendant White should take one part of the contract, and go to Watertown, where Priest and Gilkey resided, and get them to sign it; and that the plaintiff Parker, who retained the other part of the contract, should go to Watertown within a few days afterwards, and exchange contracts with White; taking the one signed by Priest and Gilkey, and leaving the part retained by him, to which White was then to obtain their signature.

The witness further stated, that on his return to Watertown, he went with White to Priest and Gilkey's, and there saw Gilkey sign the name of the firm of Priest and Gilkey to the contract. But Parker never went to Watertown to exchange contracts with White, nor were they ever exchanged; the part held by the plaintiffs, on which the action was brought, being the same that was retained by Parker; and the other part, which was taken to Watertown by White, and signed by Gilkey, remaining with the defendants.

The defendant contended, upon these facts, 1st. That there had been no delivery by the defendants of the contract declared on; and, 2d. That the instrument, having been written as if to be signed by four sureties, would not be binding upon the two by whom it was signed, unless it should be shown, that they waived the execution of it by the other two. These objections being overruled by the presiding judge, the case proceeded, and a verdict was taken by consent for the plaintiffs, for nominal damages, subject to the revision of the whole court.

If the court are of opinion, that the action will not lie, the

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verdict is to be amended, so as to stand as a general verdict for the defendants, and judgment to be entered accordingly.

A. H. Nelson, for the plaintiffs.

E. Buttrick, for the defendants.

SHAW, C. J. This is an action of debt on a contract under seal, alleged to have been executed by the defendants. It is very clear, that the plaintiffs cannot recover in an action either of debt or covenant, unless the instrument relied on as a contract can be shown to be the deed of the defendants, and as such signed, sealed, and delivered by them. In this case, the delivery is denied.

The possession of an instrument, signed and sealed by those to whom it purports to be made, is *prima facie* evidence of delivery; but it is *prima facie* only, and may be controverted by other evidence. Then, taking the testimony of the attesting witnesses, it appears that the indentures were prepared and partly executed at Lexington, where the plaintiffs reside, the names of Priest and Gilkey, residing at Watertown, and not there present to execute, not being therein; that after an objection on that ground, and some conversation, their names were interlined, with an understanding that after being executed by the parties then present, one part should be taken to Watertown, to be executed there by Priest and Gilkey, and then exchanged, and the part thus executed be taken by the plaintiffs, instead of the one which they then retained. The part so taken was executed by one of the firm of Priest and Gilkey in the name of the firm. But the parts were never exchanged.

The court are of opinion, that the evidence shows no sufficient legal delivery of the instrument, to make it the deed of the defendants. The part held by the plaintiffs bore the names of two persons as obligors, who had not executed it, showing it to be imperfect and incomplete on the face of it, until something further should be done; and going from the face of the paper to the evidence *aliunde*, it is shown, that it was not intended to be the deed of the defendants, till executed by the other parties named, and the counterpart delivered in exchange.

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According to the agreement of the parties, the verdict is to be so amended as to stand as a general verdict for the defendants.

4c 288
160 399

Enoch W. Lyman *vs.* The Boston & Worcester Railroad Corporation.

The statute of 1840, *c.* 85, making the proprietors of railroads responsible for injuries by fire communicated from their locomotive engines, applies to railroads established before as well as since its passage; and extends as well to estates, a part of which is conveyed by the owner, as to those of which a part is taken by authority of law, for the purposes of a railroad.

This was an action on the case, on the act of 1840, *c.* 85, § 1, to recover damages of the defendants, for an injury sustained by the plaintiff in the destruction of certain buildings on his land, in consequence of fire communicated thereto by a locomotive engine of the defendants, while passing on their road. The case was submitted upon an agreed statement of facts.

The buildings, for the destruction of which the action was brought, were burnt and destroyed at the time alleged in the declaration, by means of fire communicated from a locomotive engine of the defendants, while passing on their road. The plaintiff was insured against fire, at the time of the accident, in the sum of $800 on the buildings destroyed, by the Middlesex Mutual Fire Insurance Company, by a policy dated February 25th, 1842; which was subsequent to the opening of the whole of the defendants' road for travel.

The plaintiff demanded payment of his loss of the defendants; but the claim not being settled by them, or the amount agreed to, the plaintiff assigned the same to the insurance company; who thereupon paid him the sum of $800, and agreed to pay him such further sum as should be recovered of the defendants. This suit was then commenced by the insurance company, and is now prosecuted by them, in the name and by the authority of the plaintiff.

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The land, on which that part of the defendants' road was laid, where the engine was passing when the fire was kindled, was conveyed to the defendants by William Jackson, February 15th, 1834, by a deed of warranty, in the common form, with an additional covenant, that the grantor would make and maintain all such walls and fences, as might be necessary, on the boundary lines between the granted premises and his own land.

The land, upon which the buildings stood that were burnt, was adjoining the land conveyed by Jackson to the defendants, and a part of the same close before such conveyance was made, and was conveyed by Jackson to the plaintiff, November 1st, 1837. The buildings destroyed stood upon the close before either of these conveyances was made; but large additions and improvements were put upon them, and the personal property destroyed with them was placed therein, subsequently to the conveyances by Jackson.

E. R. Hoar, for the plaintiff.

G. Bemis, for the defendants. 1. The act of 1840 does not apply to the defendants; they acting under their charter granted before its passage. *Burroughs* v. *Housatonic Railroad Co.* 15 Conn. 124; *Whiteman* v. *Wilmington & Susquehanna Railroad, Co.* 2 Harring. 514; *People* v. *Platt*, 17 Johns. 195; *Crenshaw* v. *Slate River Co.* 6 Rand. 245; *Commonwealth* v. *Breed*, 4 Pick. 460; *Nichols* v. *Bertram*, 3 Pick. 342; *Derby Turnpike Co.* v. *Parks*, 10 Conn. 522.

2. It does not apply in cases where the rights of the railroad company are obtained by contract with the owner; here the owner, in giving a deed of land for the purposes of a railroad, must have contemplated the risk of fire from engines running on the road. *Webber* v. *Eastern Railroad Co.* 2 Met. 147; *Brearley* v. *Delaware & Raritan Canal Co.* 1 Spencer, 236; *Lowell* v. *Locks and Canals*, 7 Met. 1; *Tucker* v. *Bass*, 5 Mass. 164; *Fuller* v. *Plymouth*, 15 Pick. 81; *Babcock* v. *Western Railroad Corp.* 9 Met. 553; *Western Railroad Corp.* v. *Babcock*, 6 Met. 346, 354; *Foster* v. *Boston*, 22 Pick. 33; *Dodge* v. *Essex*, 3 Met. 380.

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DEWEY, J.* The statute of 1840, *c.* 85, imposes upon railroad corporations a general liability for damages occasioned by fire communicated from their locomotive engines. It is contended, however, that the provisions of this statute do not apply to a case like the present, where the title of the plaintiff is derived from one who has himself, by his deed, granted the land embraced within the location of the railroad, and by the very terms of the grant has conveyed it for the purpose of being thus used for a railroad. The argument is, that the grantor having thus granted a certain definite parcel of land, for the purpose of a railroad, out of a much larger parcel retained by him, the grant is subject to all the consequences necessarily attendant upon such a use of the same, and particularly such as would result from the running of engines, and the exposure of property in his adjacent land to such injury and loss as would naturally result therefrom; and that the railroad corporation, while in the exercise of their appropriate business, are only responsible for ordinary care and diligence in the manner of using their road.

It is not contended, that the statute was not intended to embrace the case of those whose land has been taken under the provisions of the charter of the railroad; but the argument assumes a distinction between those who convey the right to appropriate a portion of their land to the proprietors of a railroad, by deed, and those who do no other act than suffer their land to be taken by such proprietors, under their authority to enter upon and take land for the purposes of their road, paying therefor such damages as the county commissioners or a jury shall award.

We can perceive no sound distinction between the cases supposed. Each of these modes of acquiring the necessary real estate for the purpose of a railroad is authorized, both by the general laws and by the acts creating railroad corporations. In each, the land owner is supposed to receive full satisfaction for all the injuries necessarily resulting from the use of the same for a railroad. But with the use of locomo-

* FLETCHER, J., did not sit in this cause.

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tive engines, greater hazard to contiguous buildings and property owned by the adjacent land owners may arise, than was originally contemplated, or ought to be left to the ordinary common law remedies.

We consider this provision of the statute of 1840, c. 85, as one of those general remedial acts passed for the more effectual protection of property, against the hazards to which it has become subject by the introduction of the locomotive engine. The right to use the parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations, and impose such liabilities for injuries suffered from the mode of using the road, as the occasion and circumstances may reasonably justify.

These provisions in the act referred to are of general import, and equally embrace the cases of those who have by deed granted to a railroad corporation the right to enter upon and use their land, or have given a title to the land itself included within the location, and those other persons whose land has been taken and held merely by the force of the location of the railroad under the charter authority. These principles, we think, are sufficient to decide the present case, and warrant us in ordering judgment for the plaintiff.

Giles A. Meacham *vs.* The Fitchburg Railroad Company.

4c 291
158 186
4c 291
e176 s218
f176 s214
4c 291
180 s281

The "three nearest towns not interested," from which jurors are to be taken to estimate the damages caused by the laying out of a highway or railroad, are the three towns nearest to and exclusive of the town in which the land lies, over which the highway or railroad is laid.

A sheriff's jury, to assess damages for land taken for a highway or railroad, may be summoned by the constables of the several towns, from whence they are taken, or partly by such constables, and partly by the deputy sheriff by whom the warrant is executed.

The mortgagee of land taken for a railroad need not be made a party to proceedings by the mortgagor for the assessment of damages, provided he gives his assent thereto by a writing filed in the case.

The want of proper parties, to a proceeding before a sheriff's jury, for the assessment of damages for land taken for a highway or railroad, must be objected before the commissioners, upon the application for such jury.

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Meacham v. Fitchburg Railroad Company.

In estimating the damages for land taken for a highway or railroad, any direct and peculiar benefit or increase of value, accruing therefrom to land of the same owner adjoining or connected with the land taken, and forming part of the same parcel or tract, is to be considered by the jury and allowed by way of set-off; but not any general benefit or increase of value received by such land in common with other lands in the neighborhood; nor any benefit to other land of the same owner, though in the same town.

The time, at and from which the benefit accruing to the owner of land taken for a highway or railroad is to be estimated, in assessing his damages for such taking, is that of the actual location.

This was an appeal from a judgment of the court of common pleas, accepting the verdict of a jury, summoned at the request of the petitioner, to revise the damages awarded to him by the county commissioners, by reason of the taking of his land in Watertown, in this county, by the respondents, for the construction of a branch railroad to that town.

The questions submitted to the court arose upon the proceedings at the trial before the jury, and are thus stated in the report thereof by Seth Ames, esquire, the presiding officer.

Before proceeding with the trial, (the jurors summoned being in attendance at the time and place appointed,) it was moved by the respondents that the jurors should not be empannelled for the following reasons:—

1st. Because none of the jurors were drawn, summoned or returned from the town of Watertown, in which the lands alleged to have been injured by the laying out of the railroad of the respondents are situated; the town of Watertown having no interest in the question to be tried by the jury.

2d. Because certain of the jurors, namely, those from the city of Cambridge, and from the town of Brighton, were summoned by constables of said city and town, respectively, and not by the deputy sheriff who executed the warrant.

3d. Because certain of the jurors, namely, those from the town of West Cambridge, were summoned by the deputy sheriff who executed the warrant, and others of them by constables of Cambridge and Brighton.

This motion was overruled, and the respondents excepted.

4th. The jury were thereupon empannelled and sworn,

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and the trial proceeded; and it being made to appear, that the lands described in the petition had been mortgaged as collateral security for a debt to Luke Forbes and Samuel Stickney, and that neither of the mortgagees had been summoned in to become a party, and there being no evidence that the mortgage had been paid or released, the respondents objected to any further proceeding by the jury, to estimate the damages alleged to have been sustained in the real estate described in the petition. But as the petitioner produced and filed in the case a written paper signed by the mortgagees,* whereby they consented to the assessment and award of damages to the petitioner, and waived all objection to the proceedings in his behalf, the presiding officer overruled the objection, to which the respondents excepted.

5th. The respondents then proved, that the petitioner, at the time of the laying out of the railroad, and ever since, was the owner of certain other lands and buildings in Watertown, near but not adjoining the lands described in the petition; they then offered evidence for the purpose of showing, that since the laying out and construction of the railroad, and in consequence thereof, the lands and buildings of the petitioner, other than the lands described in the petition, and separate therefrom, as aforesaid, had increased in value to the petitioner. But the evidence so offered being objected to, the presiding officer decided that it was inadmissible; and to this decision the respondents excepted.

6th. Being requested by the parties to direct the jury, as to the rules of law by which they were to be governed, in

* The following is a copy of this paper:—

"The undersigned mortgagees of the land situated in Watertown in the county of Middlesex, belonging to Giles A. Meacham, through which the Fitchburg Railroad Corporation have located and constructed their Watertown Branch Railroad, hereby signify their assent to the assessment and award of the damages done or caused to said land, by the jury who are summoned on the petition of said Meacham, to estimate said damages; and we do hereby waive all objection to the proceedings in said Meacham's behalf, and to the assessment and award to him of the full amount of said damages. Dated at Watertown, this thirteenth day of August, in the year eighteen hundred and forty-seven."

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estimating the petitioner's damages, after receiving the testimony on both sides, the presiding officer instructed the jury, (among other things,) that if they were satisfied that the laying out and construction of the respondents' railroad had created or occasioned any benefit or advantage to the lands of the petitioner, described in his petition or immediately adjoining or connected therewith, rendering the part not actually occupied by the respondents more convenient or useful to the petitioner, or giving it some peculiar increase of value in the market, as compared with other lands generally in the vicinity, it would be their duty to allow for such benefit or increase of value by way of set-off, in favor of the respondents; but that, on the other hand, if the construction of the respondents' railroad, by increasing the convenience of Watertown generally as a place of residence, and by its anticipated and probable effect or influence in increasing the population, business and general prosperity of the place, had been the occasion of an increase in the saleable value of real estate generally near their depot, including the petitioner's said lands, and thereby occasioning a benefit or advantage to him in common with other real estate owners in the vicinity, this benefit would be too contingent, indirect and remote, to be brought into consideration in this question of damages to a particular parcel of land. To these instructions the respondents excepted.

7th. The presiding officer also instructed the jury, that for the purposes of this trial, the land might be considered as taken by the respondents, when their track was actually staked out, and its precise location thereby indicated; that any benefit to the petitioner's property, in order to be allowed to the respondents, by way of set-off, must be some increase upon the value which it had at the time of such taking, and not at any previous time; and that no allowance was to be made for any effect produced by the general expectation that there was to be such a railroad, or by the passage of its charter. And to this instruction also the respondents excepted.

E. R. Hoar, for the respondents.

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E. Buttrick (with whom was *J. J. Clarke*), for the petitioner.

Dewey, J. The first objection, stated in the bill of exceptions, that none of the jurors were returned from the town of Watertown, was directly overruled in the case of *Wyman* v. *Lexington & West Cambridge Railroad Co.* 13 Met. 316, and is not further urged. The next objection to the validity of these proceedings, the summoning of the jurors by a constable, is certainly one which is not free from difficulty. It was much considered by us in the case just alluded to. The jury, in that case, were summoned by the sheriff, or his deputy, and the question was as to the legality of such service. This opened the general question, and in the opinion given in that case, while we sustained the proceedings, we did not express any thing adverse to the right of summoning jurors by a constable as in other cases. The various provisions of the revised statutes, on this subject, are to some extent apparently conflicting. By *c.* 39, § 57, the proceedings are to be the same as in the case of highways; and by *c.* 24, § 18, which provides for the summoning of jurors in cases of highways, it is enacted, that the jury shall be summoned by the sheriff or his deputy; but in § 19, it is provided, that the jury shall be "drawn, summoned and notified as in other cases." This latter section would embrace constables, as proper officers for summoning the jurors; that duty in ordinary cases devolving upon them.

In the present case, it appears that the requisition was duly issued by the sheriff upon the selectmen of the various towns, requiring the drawing of the jurors; that the sheriff gave the proper order as to the time of the assembling of the jury; and that all the error suggested upon the most strict construction of the statute was, that the jurors were notified by a constable of the time and place of the hearing. The jurors thus notified having actually attended, the objection, as will readily be seen, is a mere matter of form. Their proper selection being secured, and the time and place of their meeting being properly appointed, it would seem quite immaterial, whether the jurors attended upon notice by a

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deputy sheriff or a constable, or even voluntarily, without any formal notice. It seems to us, therefore, that it is no valid objection to this verdict, that some of the jurors were notified by a constable. It is within the provisions of the nineteenth section of the twenty-fourth chapter, taking the same literally, although not probably the mode contemplated by the legislature. As heretofore stated, we held in the case of *Wyman* v. *Lexington & West Cambridge Railroad Co.* that the eighteenth section authorized the summoning of the jurors by the sheriff or his deputy; and we are of opinion, that this is more obviously within the statute provisions. But the language of the nineteenth section goes somewhat further, and apparently authorizes the summoning of jurors in these cases by a constable. In view of these statute provisions, relating to the irregularity suggested, we do not feel authorized to set aside this verdict on the ground that the jurors were notified by a constable.

The next objection is virtually disposed of by the view which we have taken of the one preceding. It does not vary the result, that the jurors from two of the towns were notified by a constable, and the others by a deputy sheriff. The latter mode was clearly legal, and, to the extent it was adopted, does not vitiate the notice to the other jurors.

In reference to the fourth objection, as to an outstanding mortgage, the court are of opinion, that the petitioners having produced and filed a paper signed by the mortgagees, assenting to the assessment and award of damages to the petitioners, and waiving all objections to the proceedings by reason of their holding such mortgage, this objection was removed.

As to the omission to summon the mortgagees, we think that the whole matter of new parties is more properly cognizable before the commissioners, upon a hearing before issuing a warrant for a jury. Upon the application for such jury, notice is given to the adverse party, who may appear and interpose all valid objections to the right of the petitioners to recover damages or to have them assessed by a jury.

The most important and difficult question in the case is

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that which arises upon the ruling of the presiding officer, as to submitting to the jury, in reduction of damages, the fact that the petitioner was the owner of other lands and buildings in Watertown, near to but not adjoining or parcel of the land described in the petition. This subject is confessedly one of difficulty. The general doctrine was very broadly advanced in *Commonwealth* v. *Coombs*, 2 Mass. 489, 492, that the benefit occasioned by laying out a highway to the other property of the party seeking to recover damages for his land actually taken should be considered in reduction of the damages for the land taken. The Rev. Sts. *c.* 24, § 31, in like manner, provide generally for an allowance by way of deduction for such advancement in value of other property.

That there must be some limitation of the proposition, that the respondents may show in reduction of damages any collateral benefit which the petitioner has received in his other property, seems quite obvious. The party, whose land has been taken for a railroad, has a right, in common with his other fellow-citizens, to the benefit arising from the general rise of property in the vicinity, occasioned by the establishment of the railroad and the facilities connected therewith.

It would operate with great inequality, to hold that where there are various individuals, each owning large trading or manufacturing establishments in the immediate vicinity of a railroad, but without being adjoining to or connected with the located limits of such railroad, one of whom is the owner of a parcel of land, situate in another part of the town, over which the railroad is actually located, that as to the latter, he is, by way of reduction of damages for his land thus taken, to be charged for all the incidental benefits, which he receives from the location of the railroad in the vicinity of his other land and establishment, while his neighbor, who is equally benefited, is exempt from any contribution to this object.

It is difficult to draw the line with precision, and at the same time to establish a rule, which will do equal justice to all concerned. The rule which was taken at the hearing

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before the jury, we think, approximates as nearly to the standard as any that can be adopted. It embraces the land as to which damages are claimed, and any land of the petitioner adjoining, or connected therewith as one parcel or tract of land, and if in any portion of such land the location of the railroad has occasioned a rise in value, and the petitioner has received any peculiar benefit from the location of such road, it is the duty of the jury to make a deduction, by way of set-off, and a reduction of damages on account of such advancement in value of the remaining portion of the lot or parcel of land. Thus limited to the land adjacent to that taken for the railroad, or connected as one tract or parcel of land therewith, the rule will be found to be reasonable in itself and of easy application. The great and leading principle, to authorize such reduction of damages, is the direct benefit, or increase of value to the remaining part of the tract or parcel of land, by reason of the railroad's passing through the lot or tract, as to which the damages are claimed. We approximate very nearly, in this way, to the rule of direct benefit, or actual increase of value in the adjacent land, and exclude the more uncertain and fanciful estimation of anticipated advantages to other parcels, more or less remote, and which share only in the common benefit of the lands of the citizens generally.

The further instructions to the jury upon this point seem to have been entirely correct, and in accordance with the principle of the other ruling. The respondents are not to have the benefit of any increase in value of the petitioner's adjacent land, so far as he has been benefited by the railroad, merely in common with all the citizens of the neighborhood or village, by the anticipated general rise of property, by reason of the railroad's passing through the town and in the vicinity of their lands. It is only the increased value of the land of the petitioner, arising from the location of the road over some part of it, which is to be taken into consideration. If such location over the land of the petitioner has raised the value of his adjacent lands, then a reduction or offset is to be allowed the respondents on that account.

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It is the increase of value occasioned by the location, and of course has reference to the state of things existing at the time when the land is taken by the location. The presiding officer directed the jury to take the earliest period indicating such location, namely, "the staking out of the road." This being most favorable for the respondents, it is unnecessary to decide, whether that period, or the subsequent one of the actual official return of the real location, would have been, strictly speaking, the more correct. The principle adopted was the right one, that the actual location of the road was the period of time in reference to which the increased value of the adjacent land was to be estimated with a view to the set-off. Upon the whole matter, the court are of opinion, that the verdict of the jury was properly accepted; and that the exceptions taken to the proceedings were rightly overruled by the court of common pleas.

WILLIAM JONES *vs.* THE INHABITANTS OF WALTHAM.

4c 299
147 464
4c 299
169 509
4c 299
e186 250

If the proprietors of a railroad, acting within the scope of their lawful authority, construct a cattle guard in their road, at a place where it crosses a highway on the same level; and the town erect and maintain a sufficient and proper barrier against such cattle guard, up to the railroad, and as far as can be done without impeding the passing of cars on the same; the town are not responsible for an injury sustained by a traveller on the highway, in consequence of his falling into the cattle guard, without any fault or neglect on his part.

THIS was an action on the case to recover damages for an injury sustained by the plaintiff, and alleged to be occasioned by a defect in a highway, which the defendants were bound to keep in repair. The case was tried before *Dewey*, J., by whom it was reported for the consideration of the whole court.

The plaintiff was on foot at the time when the accident happened, and fell into an opening called a "cattle guard" at the crossing of the Fitchburg railroad over a highway, in Waltham, which, it was admitted, the defendants were bound

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to maintain. The highway, at the place in question, passed over a meadow, and then by a bridge over a brook from north to south, and was crossed by the Fitchburg railroad from east to west near the brook. The plaintiff, while passing along the highway in the evening, and exercising ordinary care, fell into the excavation and was severely injured.

The defendants introduced evidence to show, that they had provided and maintained sufficient and proper barriers and railing up to the railroad, and as far as the same could be maintained without impeding the passing of the cars on the railroad. The cattle guard, which was about three feet deep, and wholly outside of the highway, came up to the line of the highway.

The court instructed the jury, that the general rule, applicable to towns in this respect, was, that if there were dangerous pits, excavations, or precipices, without the limits of the located highway, but so near to it that they would, without barriers or guards, endanger the safety of passengers using the travelled or made part of the road, with ordinary care and diligence to avoid exposure to injury, it was the duty of the town to guard against such pits, excavations, or precipices, by means of a railing or in some other proper mode; and that if the town neglected to do so, and, in consequence of such neglect, any person using the made road sustained an injury, the town would be liable for the damages thereby occasioned.

The jury were also further instructed, that if the proprietors of the railroad were duly authorized to cross the public highway in Waltham in the manner they did, that is, on the same level; and if the injury sustained by the plaintiff arose from his falling into a railroad pit, called a cattle guard, which was wholly without the limits of the located highway; and if the defendants had erected proper barriers and guards as to every portion of the highway, except the space actually in use by the railroad corporation, for passing with their engines, cars and other proper vehicles; that as to this portion of the road thus limited, the defendants were not by law required to erect and maintain a barrier; and that their

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omission to do so would not subject them to any liability for damages occasioned by a traveller's passing out of the limits of the highway, at this place in the road, and falling into a pit or excavation of the railroad, wholly without the limits of the highway.

The jury, under these instructions, returned a verdict for the defendants. If the instructions were erroneous, the verdict is to be set aside, and a new trial ordered; otherwise judgment is to be rendered on the verdict.

A. H. Nelson and *J. Rutter*, for the plaintiff, referred to Rev. Sts. *c.* 39, §§ 66, 68, 80, 81; *St.* 1842, *c.* 22; *St.* 1846, *c.* 271, § 3; *Cobb* v. *Standish*, 2 Shep. 198; *Currier* v. *Lowell*, 16 Pick. 170.

E. R. Hoar and *A. Moore*, for the defendants, relied on the *St.* 1846, *c.* 271, § 3; Rev. Sts. *c.* 39, § 77; *Howard* v. *North Bridgewater*, 16 Pick. 189; *Tisdale* v. *Norton*, 8 Met. 388; *Howland* v. *Vincent*, 10 Met. 371; *Tinker* v. *Russell*, 14 Pick. 279. In the case of *Cobb* v. *Standish*, cited for the plaintiff, the court in Maine decided this case in favor of the defendants.

METCALF, J. The evidence in this case was, that the pit, into which the plaintiff fell, "was wholly outside of the highway, and came up to the line of the highway." The only ground, then, upon which the town can be held liable to this action, is, that there was a dangerous place on the roadside, which required a fence or barrier, to make the road safe for travellers, as in case of a bridge, causeway and the like. But when a town has no power or right to erect such fence or barrier, it is not answerable for the consequences which follow from the want of it. In the present case the town had no authority or right to erect a barrier which should obstruct the railroad; but it "had maintained and kept up a sufficient and proper barrier and railing, up to the railroad, and as far as it could be maintained without impeding the passage of the cars on the railroad." The defendants, having done all that the law required or permitted them to do, are not answerable to the plaintiff, either on the statute, or on the principles of justice.

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If the railroad corporation acted within the scope of their lawful authority, in making the trench, or cattle guard, and in the manner of constructing their track by its side, then the plaintiff has suffered from an accident which happened from an authorized public work, and has no legal remedy. If the railroad corporation have exceeded their authority, or have not constructed and guarded their track, as the law directs, and have placed a nuisance in the highway, then they are liable to indictment, and any person who suffers a peculiar and special damage therefrom, may recover compensation by civil action against that corporation.

Judgment on the verdict.

Lorenzo G. Howe *vs.* Joseph Butterfield.

It is the duty of an officer, in the execution of a writ of *habere facias possessionem*, to deliver actual and quiet possession of the premises to the party in whose favor the writ is issued; and, for this purpose, to remove from the possession, (using no more force than is necessary,) all persons therein; especially if they claim under the party against whom the judgment is rendered.

An officer, in the execution of a writ of *habere facias possessionem* of a house, may enter the same by breaking a door which is fastened, without making a previous demand of admission, although there are persons then in the house; provided they are there for the purpose of holding possession by force, and of opposing the officer in the execution of his precept, and it does not appear, that he knew, or had any cause to suppose, that any person was in the house.

Where an officer, in the execution of a writ of *habere facias possessionem* of an undivided part of a house, entered into the same, and, by the direction of the owners of the other parts, who were also the assignees of the judgment upon which the writ issued, forcibly removed from the house a person entering without right after the entry of the officer; it was held, that the officer was justified, both by the order of such owners, and by the authority of his writ.

This was an action of trespass, for an assault and battery, alleged to have been committed upon the person of the plaintiff, on the 29th of July 1846, in a certain meeting-house in Lowell.

At the trial, in the court of common pleas, before *Wells*, C. J., it appeared in evidence on the part of the plaintiff, that the First Freewill Baptist Church in Lowell, of which the plaintiff was a member and one of the deacons, had

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been in actual possession of the house for the last ten years, and that they occupied the same up to the time of the alleged trespass; that the property of the church, being the ordinary furniture of the house as a place of public worship, was then remaining therein as usual; and that up to that time the plaintiff had furnished and occupied a pew in the same.

It was also in evidence, that the plaintiff, at the time of the alleged trespass, being in the meeting-house, was taken by the defendant and put out by force and against his will; but that no more force was used than was necessary to effect the purpose of removing the plaintiff from the house.

On the part of the defendant, it was proved, that on the morning of the 29th of July, 1846, a writ of *habere facias possessionem*, in favor of one Wiggin against the elder and deacons of said church, for one undivided seventy-eighth part of said house, was put into the hands of the defendant, a deputy sheriff, for service; that thereupon the defendant took with him Benjamin F. Butler, Thomas Hopkinson, and Tappan Wentworth, as his friends, and entered the house, (not by the door, which was locked, but) through a store under the house, by breaking through a door that was fastened; that when the defendant entered, there were several persons in the house, members of the church, one of whom was the sexton, claiming to keep possession thereof, and of the property therein; that soon afterwards several other members of the church came in, among whom was the plaintiff; that the defendant ordered the members of the church and their attorneys to leave the house, in order (as he said) that he might take possession by virtue of the writ in his hands.

The attorneys of the church thereupon denied the defendant's right to expel them from the house by virtue of the writ, it being for one seventy-eighth part only, in common and undivided; but expressed their entire assent that he should take possession of one seventy-eighth part, according to the tenor of his precept; and they wholly disclaimed any intention, on their part, to hinder or disturb the officer from executing his precept, by taking and keeping quiet possession

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of the one seventy-eighth part in common and undivided; but they protested against being removed from the house.

It further appeared, that the defendant held a consultation with the said Butler, Wentworth and Hopkinson, and that he then by their direction, and in their presence, claimed a right to remove all persons there remaining from the house. not only by virtue of the precept in his hands, of the interest in which they claimed to be the owners, but also upon the ground, that the title to the remaining seventy-seven parts was in Butler, Hopkinson and Wentworth, by virtue of a deed of trust given to them by Jesse Swain and Andrew J. Wiggin, and that as the agent of the said Butler, Hopkinson and Wentworth, and by virtue of the authority of his precept, he ordered the plaintiff and all others present to leave the house, and, upon the plaintiff's refusing to go, claiming a right to remain, the defendant removed him as before stated. The trust deed, alluded to, was not read, nor was any request made to have it produced or read; but it was conceded, for the purposes of the trial, that it was a valid deed, giving to the grantees such a title as it purported to convey, and that the grantors therein had a good title.

Considerable evidence was also introduced upon the question whether any other notice of their title, than as above stated, had ever been given by the trustees to the members of the church. The presiding judge ruled that the recording of the deed, and the notice given by the defendant of the trustees' claim under the same, constituted sufficient notice of their title to those members who were then in the house.

It appeared, also, that the said Butler, Hopkinson and Wentworth were the assignees of the judgment on which the writ of possession was issued, and that one of them was the attorney of the judgment creditor.

The presiding judge instructed the jury, that if they believed the facts as above stated, they should find for the defendant. Whereupon the jury returned a verdict for the defendant, and the plaintiff excepted.

R. B. Caverly, for the plaintiff.

B. F. Butler, for the defendant.

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WILDE, J. This was an action of trespass for an assault and battery, and for expelling the plaintiff forcibly from a house used by the elder and deacons and members of the First Freewill Baptist Church in the city of Lowell. The defendant justifies as a deputy sheriff, by virtue of a writ of *habere facias possessionem* against the elder and deacons on a judgment for one seventy-eighth part, in common and undivided, of the said house. And we are of opinion, upon the facts reported, that the proceedings of the defendant are fully justified, and that the ruling of the presiding judge was correct.

The defendant had authority to enter the house, as he did, by breaking open a door which was fastened. Bac. Ab. Trespass, F. 2; *Semayne's Case*, 5 Co. 91. It does not appear, it is true, by the evidence, that any demand was first made to have the door opened; but it does not appear that the defendant knew, or had any cause to suppose, that any person was in the house before he entered. After his entry, he found several persons there; but it appears clearly, that they were there for the purpose of holding possession by force, and to oppose the defendant in the execution of his precept. A demand, therefore, upon them to open the door would have been useless; and the plaintiff was not there until after the defendant's entry; and if he had been, there can be no doubt that he would have acted in concert with the persons who were there. Under these circumstances, we are of opinion, that the defendant's entry to execute his precept was lawful without any previous demand.

The remaining and principal question is, whether the defendant was justified by his writ in removing the plaintiff from the house by force and against his will; and we are of opinion that he was. The defendant was authorized and bound by his writ, to deliver actual and quiet possession of the house to the party in whose favor the writ issued, and for that purpose to remove from the possession all persons therein, and especially those claiming under the party against whom judgment had been recovered. Bac. Ab. Eject. G. 2. In *Upton* v. *Wells*, 1 Leon. 145, it was held, that if a sheriff

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turns out all persons he can find in the house, and gives the plaintiff, as he thinks, quiet possession, and after the sheriff is gone, there appear to be some persons lurking in the house, this is no good execution; and therefore the plaintiff shall have a new *habere facias possessionem.* It appeared, in that case, that the persons secreted in the house, immediately after the sheriff's departure, expelled the plaintiff; upon notice of which he returned to the house to put the plaintiff in full possession, but he was so resisted by them, that, without peril to his life, he could not do it.

It has been doubted, whether there was not a full execution of the writ, in that case, before the expulsion of the plaintiff, because the persons in the house were secreted, and the plaintiff had quiet possession until after the departure of the sheriff; but it cannot be doubted, that if the sheriff had known that the persons were in the house, and especially if they had opposed the delivery of possession to the plaintiff, he would have been authorized to remove them; and it would have been his duty so to do. Bac. Ab. Eject. G. 2.

Indeed, the general rule of law in this respect is quite clear, and is not controverted by the plaintiff's counsel; but they contend that this is not a case within the general rule, because the writ of possession was only for one seventy-eighth part of the premises; and that the elder and deacons of the church, of which the plaintiff was a member, had a right of possession of the other seventy-seven shares, and to hold them in common with the plaintiff. But it appears, by the facts reported, that they had no such right; the title to the whole estate having been acquired by the assignees of the judgment on which the writ of possession issued. The plaintiff had no title, but was a mere intruder, who entered the premises without right after the entry of the defendant, who had a right to expel him by the order of the owners of the seventy-seven shares, as well as by the authority of his writ. No more force was used than was necessary to effect the expulsion, and which would support a plea of *molliter manus imposuit.* It was contended, that the elder and deacons of the church were tenants in possession, and were entitled to a

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previous notice to quit; but there is no evidence to prove that they were ever tenants under the party who recovered judgment against them, or under the assignees of the judgment, or under any one from whom they derived their title. It is clear therefore that the elder and deacons were entitled to no notice to quit, previous to the defendant's entry under his writ. *Exceptions overruled.*

CHARLES COGGSWELL *vs.* THE INHABITANTS OF LEXINGTON.

4c 307
172 409

Where a traveller on a highway, while in the exercise of ordinary care, received an injury in consequence of driving his wagon against a post; and it appeared that the line of the highway was not indicated by any visible objects; that the post, which occasioned the injury, was near the true line of the highway, and within the limits of the general course and direction of the travel, and where travellers were accustomed to pass, and rendered the travelling dangerous; that there was nothing to indicate that the post was not within the way intended for public travel; and that the town, though they had reasonable notice of the course of the travel, and that the post was dangerous to travellers, suffered it to remain an unreasonable time: It was held, that the town were liable, under the statute, for the injury sustained by the plaintiff.

THIS was an action on the case for an injury sustained by the plaintiff in being thrown from his wagon, in consequence of its being driven against a post standing in the highway in Lexington, while the plaintiff was travelling along the same, in the evening.

At the trial, in the court of common pleas, before *Washburn*, J., it was in evidence: That for a long time, there had been a highway leading through Lexington from West Cambridge, by the Monument House, a long-established public house, so called, in Lexington, to Concord, the boundaries whereof, in the part hereafter mentioned, could not be ascertained but by a reference to fences, &c.: That in 1831, the county commissioners located and defined that part of the highway which extends from a point towards West Cambridge, up to within a few rods of the post which occasioned the injury, but no farther; the post being about ten rods from the Monument House: That along in front of the Monument House, to a short distance from the post, the

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ground is nearly upon a level between the house and the fences upon the opposite side of the road, and the whole of it has long been travelled over, there being no grass or bank to indicate the line of the highway from the way travelled by persons going to or coming from the Monument House: That the post stood in front of a store, which was nearly in a line with the Monument House, and the sheds belonging to it, which were used for the accommodation of travellers resorting to the house: That the store was erected in 1839, before which time there was no travel in front of where the store now is, but since which there had been passing, more or less, with teams and carriages from the highway, where the location of 1831 terminated, and going in the direction of the Monument House, between the post and the store: That, as testified by the plaintiff's witnesses, the tracks of wheels and other marks of travel came up to and along by the post, as well on the inner as the outer side of it; and there was nothing to indicate to a stranger, that the line of the travel passed upon one side rather than the other of the post; but, in this respect, the evidence on the part of the defendants was conflicting with that of the plaintiff: That from the fence opposite the Monument House to the post, the distance was about four rods; from the post to the store about twenty-four feet; and from the fence to the Monument House about the same distance as from the fence to the store: That the post was two feet and a half high; and that the plaintiff, while travelling in the evening with his wagon from West Cambridge through Lexington towards Lowell, passed along the aforesaid highway; and having occasion to stop at the Monument House, drove his wagon in such a manner, that the right shaft struck upon the post, in consequence of which the plaintiff was violently thrown from his wagon upon the ground and injured.

Two questions were made to the jury: one, whether the post was within the limits of the highway as originally laid out; and the other, whether, if it were not, it was within the limits of the ordinary travel; the plaintiff contending that in either case he was entitled to recover.

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In reference to the second question, the presiding judge instructed the jury in the following terms: —

If the line of the highway was undefined by fences, banks of earth, or other objects, and if within the limits of the general course and direction of the travel along the highway, and where travellers were accustomed to pass with teams and carriages, an object which rendered the travelling there dangerous was suffered to remain beyond a reasonable length of time, within which to remove the same, the town would thereby become liable for injury sustained by travellers by means of such object, although the same did not lie within the limits of the highway as located; provided there was nothing reasonably to indicate or give notice to travellers, that the place of such object was within the way designed for private use, or was not intended for public travel as a highway; provided, also, that the traveller exercised that degree of care and diligence, which are required of travellers on highways, in order to entitle them to recover for injuries occasioned by defects in highways; and provided, further, that the defendants had reasonable notice of the course of travel and of the existence and dangerous character of such object.

The jury found a verdict for the plaintiff, and upon being requested by the judge to state, whether they found the post to have been within the limits of the highway as located, and whether they found single or double damages, they answered, that they found that the post was not within the limits of the highway as located, but within the way that was travelled, and that their verdict was for single damages only.

The defendants alleged exceptions.

E. R. Hoar, for the defendants.

T. Wentworth, for the plaintiff.

METCALF, J. The verdict must be taken to have established the following facts: That the line of the highway was not indicated by any visible objects; that the post was near the true line of the highway, and within the limits of the general course and direction of the travel, and where travel-

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lers were accustomed to pass; that there was nothing which reasonably indicated or gave notice to a traveller, that the post was not within the way intended for public travel; that the post rendered the travelling dangerous; that the defendants, though they had reasonable notice of the course of the travel, and that the post was dangerous to travellers, suffered it to remain an unreasonable time; and that the plaintiff, while in the exercise of ordinary care, received an injury by driving his wagon against the post.

On these facts, the court are of opinion that the defendants are liable in this action, and that the instructions to the jury were right. Towns are bound to keep the roads, within their bounds, safe for travellers. And under the circumstances of this case, it was no less the duty of the defendants to guard travellers from injury by the post on the roadside, than to guard them from falling over precipices or into pits near the line of the road, or from being thrown into the water from a bridge.

The question whether the defendants had a right, as against the owner of the land where the post stood, to enter and remove it, is not now before us. But they clearly had the right, and it was their duty, if they could not lawfully remove the post, to place such a fence or other barrier between it and the road, as would have rendered the road safe.

Exceptions overruled.

JOHN HARWOOD *vs.* THE CITY OF LOWELL.

4c 310
168 253
168 383
4c 310
183 267

A husband, whose wife has been injured by reason of a defect in a highway, cannot maintain an action against the town, obliged by law to repair the same, to recover for medical and other expenses incurred, or for loss of his wife's services, in consequence of such injury.

THIS was an action on the case to recover the damages sustained by the plaintiff, in consequence of an injury received by his wife, through and by means of a defect in a highway, which the defendants were bound to keep in repair.

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The case was submitted to the court upon the following statement of facts:—

The defendants were bound by law to keep in repair the highway where the accident occurred; the defect which occasioned it had existed for more than twenty-four hours prior to the accident; and the wife was injured in the manner alleged, without any want of ordinary care on her part, or of others on her behalf.

Before the commencement of this action, the plaintiff and his wife brought an action against the defendants, for the injury sustained by her in consequence of the defect in the highway complained of; in which action, they obtained a verdict and judgment, which the defendants have satisfied.

The present action was brought by the husband alone for the recovery of the expenses for medical and other attendance, which he was obliged to incur on his wife's account, while she was suffering under the effects of such injury, and also for the loss of her services, of which he was deprived, while she was thereby rendered unable to attend to her household duties.

J. G. Abbott, for the plaintiff.

I. S. Morse, for the defendants.

Shaw, C. J. This case presents a question which has been often alluded to, but which we believe has not hitherto come directly before the court for adjudication, and which is one of great importance.

The present plaintiff has heretofore brought an action against the city of Lowell, jointly with his wife, and recovered for the injury to the wife occasioned by the defect of a highway in that city.

This is a several action brought by the husband, to recover consequential damage sustained by him, in the loss of the services of his wife, to which he claims by law to be entitled, during the period of her illness, caused by the accident, and also for the recovery of expenses for medical attendance, and other expense necessarily incurred thereby. The question is, can he recover?

It has been too long and too often held, now to be called

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in question, that the entire remedy for individuals, sustaining loss by defective highways in this commonwealth, depends on statute, and is not given by common law. The same statute law therefore which declares the right, and points out the remedy, must qualify it, and limit and control the extent of it. The question then depends on the construction of the statutes.

The provision of the revised statutes, which was in operation, when the accident in this case occurred, is as follows: "If any person shall receive any injury in his person or property by reason of any defect or want of repair," &c., the person so injured may recover, &c.

The argument is, that the statute does not intend to afford a remedy for all damages, caused by the defect, but only for those done to the person, or to the horses, teams, carriages, or other goods or chattels, of the party injured, and we are inclined to this opinion.

Were this a new act of legislation, expressed in the same terms, we should regard it as more equivocal; but it is not a new provision; it is the revision of preceding enactments; and some light may be thrown on the subject by considering the course of legislation. And we should be in danger of doing injustice to the revised statutes, if we did not bear in mind, in construing them, that where a new provision is substituted for an old one in somewhat different terms, a change of language does not always indicate an intent to change the rule, but to express the same rule in shorter and more comprehensive words. In this way brevity is sometimes gained, but at some expense of perspicuity.

The first act upon this subject was the provincial statute of 5 W. & M., *c.* 10, § 4, passed in 1693, (Ancient Charters, 269,) which, after providing that if any person happen to lose his life, in passing any highway, &c., or lose a limb, break a bone, or receive any bruise or breach in any part of his body, through any defect, &c., gave, for any other harm than loss of life, double the damages sustained thereby, and like recompense for any carriage, cart, horse or other beast harmed, or lost.

The next was the act under the constitution, that of 1786,

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c. 81, § 7, which provides a remedy for any person who shall lose a limb, break a bone, or receive any other injury in his person, or in his horse, team or other property through any defect, &c.

Under these statutes, we think it is very clear, that the remedy was confined to loss or damage done to visible and tangible property, such as animals, goods or chattels. Of the provincial act there could be no doubt. The statute of 1786 uses the term property; but there is a good rule of construction, *noscitur a sociis*, where several particulars are enumerated, followed by a word more general, the provision is thus limited to things of like kind. Therefore, though the word "property" is used, it follows words designating goods and chattels, and could not extend to mere rights.

There is something peculiar in the provision on this subject in the revised statutes. The section does not stand as it was reported by the commissioners. Their report followed more nearly the phraseology of the act of 1786; "if any person shall lose a limb, break a bone, or sustain any other injury in his person, or in his horse, team, or other property." This was a long section embracing two subjects, and an amendment was offered by the legislative committee and adopted by the legislature, throwing the same matter into two or three sections, and altering the phraseology, so as to read, "if any person shall receive any injury in his person or property."

Taking this view of the progress of legislation, the court are of opinion that there was no intention to change the rule of law, so as to include consequential damages; that the legislature well understood, that the prior law gave damages only for direct injury to the person, and direct injury to personal property, and intended to reënact the same rule in the present terms. If it had been their purpose to alter the rule in the mode proposed, we think it would have been done in more express terms, by giving a remedy for all damages, occasioned or caused by such defect, as in ordinary cases at common law, where one sustains damage by the negligence of another, as for instance, in a suit by a passenger against passenger carriers.

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Similar decisions have been made upon statutes quite similar in phraseology, if not identical, in the states of Maine and Connecticut. In an action on the case against a town for loss of services of a minor son, and also for expenses of his illness, on a statute similar to our statute of 1786, it was held, in Maine, that the action would not lie. *Reed* v. *Belfast*, 2 Appl. 246. In a similar action in Connecticut, brought by a husband and father, after a recovery by the parties directly injured, for loss of services of a wife and minor daughter, and expenses, necessarily incurred, it was held, that the action could not be maintained. The statute, as a whole, was somewhat more limited than ours. One clause, however, commented upon, and on which the same construction was put, was similar to ours, "damage in his person or property;" but this construction may have been influenced, by taking this clause in connection with others, in which the term "property" was more obviously limited to goods and chattels. *Chidsey* v. *Canton*, 17 Conn. 475.

Upon the facts agreed, the court are of opinion that the action cannot be maintained.

4c 314
167 297

HOSEA STANIELS & another *vs.* JOEL RAYMOND & Trustee.

One to whom an article is delivered on trial, in pursuance of a negotiation for a purchase thereof, who redelivers the article to the owner, within the time limited for the trial, (whether before or after the service of process upon him,) with notice that he does not intend to complete the purchase, but is left in possession of the article, is not liable therefor, as the trustee of the owner.

A supposed trustee, in addition to his sworn answers and statements, may allege and prove any other fact not stated or denied by him, that may be material to the decision of the question of his liability.

Articles exempted from execution by the Rev. Sts. *c.* 97, § 22, are not liable to attachment by the trustee process.

THIS action, which was originally commenced before a justice of the peace, came to this court by appeal from the court of common pleas, upon the answers of the supposed trustee, who disclosed as follows:—

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"He had been in treaty with the defendant for a cow to be purchased if approved. No bargain had been completed, and before the time of trying the cow had expired, and before the service of the plaintiff's writ, he had notified the defendant that he should not purchase the cow, and had delivered her to him, but the defendant left her in his possession, where she was at the time of the service of the plaintiff's writ."

In the court of common pleas, the supposed trustee offered to prove, in addition to the facts stated or denied in his answer, that the cow in question was the only one belonging to the defendant, at the time of the service of the process; and that he had offered to prove this fact at the trial before the justice, but that upon an intimation from him that the fact, if proved, would not vary his decision, the trustee waived proving the same.

M. G. Cobb, for the plaintiff, referred to *Swett* v. *Brown*, 5 Pick. 178; *Andrews* v. *Ludlow*, 5 Pick. 28; *Allen* v. *Megguire*, 15 Mass. 490; Cushing's Tr. Pro. §§ 33, 34; *Haskell* v. *Sumner*, 1 Pick. 459.

G. Farrar, for the trustee, said that the debt, if any were due, depended on a contingency, and so was not liable to attachment by the trustee process. Rev. Sts. *c.* 109, § 30, *cl.* 4. The trustee should have been permitted to prove the additional fact suggested by him. Rev. Sts. *c.* 109, § 15; *Hovey* v. *Crane*, 12 Pick. 167.

Wilde, J. From the facts stated in the answers of the supposed trustee, it is quite clear that he was not indebted to the principal defendant, at the time of the service of the plaintiff's writ upon him, as therein alleged. He had been in treaty with the defendant for the purchase of a cow; but before the service he had declined completing the purchase, and had redelivered the cow, which he had on trial, as by their agreement he had a right to do.

The cow, however, had not been taken away, and the question is, whether the mere possession of the cow, without any claim of right, by the supposed trustee, renders him chargeable under the Rev. Sts. *c.* 109, § 4; and in the opinion of the court it does not. It may well be doubted, whether

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the trustee is chargeable according to the literal construction of the statute. The words of the statute are, "Every person, having any goods, effects, or credits of the principal defendant intrusted or deposited in his hands or possession, may be summoned as trustee." The words "intrusted or deposited" imply, in their ordinary signification, something more than mere possession; but if it were otherwise, such a construction would be unreasonable and inadmissible; for thereby an innkeeper would be chargeable for the property of a traveller, which he might have in possession for the shortest time; and the hirer of a horse for a ride might be charged as trustee.

Statutes are to be construed according to the intention of the makers, if this can be ascertained with reasonable certainty; although such construction may seem contrary to the ordinary meaning of the letter of the statute. Bac. Ab. Statute I. 5; *Curle's Case*, 11 Co. 3; *Somerset* v. *Dighton*, 12 Mass. 383. Under this rule of construction, it was decided in the case of *Burlingame* v. *Bell*, 16 Mass. 318, and in sundry other cases, that the statute of 1794, *c.* 65, § 1, would not admit of a literal construction, because such would be unreasonable, and could not be supposed to be in conformity with the intention of the legislature. And although the same objections to the literal construction of that statute are not applicable to such a construction of the corresponding provision of the revised statutes, yet the objections to such a construction of the latter statute are equally cogent. Whatever may have been the reason for the alteration of the statute of 1794, by the revised statutes, we think it never could have been the intention of the legislature, that the mere possession of property, by a party having no claim to hold it against the owner, should render him liable therefor as trustee, and thereby to be subjected to trouble and expense in answering to a claim in which he has no interest. Such a construction of the statute would be prejudicial in very many cases, and cannot be admitted; nor do we think, as before remarked, that a literal construction of the statute would render the supposed trustee chargeabl

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But there is another ground, on which the trustee would be entitled to his discharge, provided the fact was as he offered to prove it to be, namely, that at the time of the service of the plaintiff's writ upon him, the cow in his possession was the only cow the principal defendant then owned.

This evidence should have been admitted under the fifteenth section of the chapter of the revised statutes above cited; and if the fact were, as it was offered to be proved to be, the cow was exempted from attachment by the Rev. Sts. c. 97, § 22. But, however the fact may be, we think the trustee is not chargeable on the ground first stated.

Trustee discharged

The case of *McElroy* v. *Raymond & Trustee* was argued on the same day, by *E. Buttrick* for the plaintiff, and *G. Farrar* for the trustee. It depended upon the same state of facts with the preceding case, except that in that case the service of the process was *subsequent*, and in this *previous*, to the redelivery of the cow. The trustee was discharged.

Francis W. Bigelow *vs.* Joseph W. Maynard.

If two arbitrators, named by the parties to a submission, are authorized, in case they shall not agree, to "select a third man to act as a third referee," such referee may be appointed before the arbitrators proceed.

Where it was referred to arbitrators to determine to what extent a building contract had been performed by one of the parties, and what deduction should be made in favor of the other, and what balance should be due to the former; an award, that a balance of a certain sum was due, was held to be sufficient, without specifying what deduction should be made from the sum named in the contract. 4c 317; 14S 330

The testimony of arbitrators is not admissible to impeach their award.

Where a submission to arbitration was entered into by mutual bonds between N. and M., the condition of one of which was, that N. should discharge and release M. from all liability, on payment to him of the sum awarded, "after discharging all trustee processes now or then pending by said N., so that said M. shall be free to pay said sum;" and the condition of the other was, that M. should pay the sum awarded to N., "provided all trustee processes now or then pending are first arranged, by said N., so as to relieve said M.;" it was held, in an action of debt on an award under this submission, by the assignee in insolvency of N., against M., that the payment to the defendant of his costs in certain trustee processes, which were

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pending at the time of the submission, and in which he had been discharged as trustee by the insolvency of N., was not a condition precedent to his obligation to perform the award.

This was an action of debt on an award brought by the plaintiff, as the assignee of James H. Norcross, an insolvent debtor, to recover the amount due by the award to the estate of the insolvent. The defendant pleaded the general issue, and specified in defence the illegality of the award, by reason of irregular and improper conduct of the arbitrators in making the same.

It appeared in evidence on the trial, before *Metcalf*, J., that on the 13th of November, 1846, the parties, having agreed to submit a matter in dispute between them to arbitration, entered into mutual bonds of submission for that purpose. The subject of the arbitration is set forth in the recital of the conditions of the bonds. The condition of the bond from the defendant to the plaintiff's insolvent was as follows: —

"The condition of this obligation is such, that whereas the said Norcross has taken a building contract of said Maynard, to build a house in Newton according to plans and specifications made by J. C. Bugbee, said contract being dated the 16th of July last; and whereas said Norcross has not proceeded and completed the said building according to said contract, and the said Maynard claims a deduction from the sum named in said contract, as the pay agreed upon; and whereas the said Maynard and Norcross have mutually agreed to refer it to S. F. Dowse and Orrin Whipple, to say what deduction shall be made in favor of said Maynard, and what balance shall be due; and in case said Dowse and Whipple shall not agree, it is understood, that they shall select a third man to act as a third referee; and the majority to decide; and it is also agreed between the parties, said Maynard and Norcross, that the decision of said referees shall be final: Now, therefore, if the said Maynard shall well and truly pay said Norcross the sum awarded, if any, equitably due on said contract as aforesaid, when the award is made, then this obligation shall be void, otherwise to be in

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full force and effect; provided all trustee processes, now o. then pending, are first arranged by said Norcross, so as to relieve said Maynard."

The recital in the condition of the bond from the insolvent to the defendant was in the same terms. The statement of the condition was as follows: —

"Now, therefore, if said Norcross shall well and truly abide by said reference and award, and shall discharge said Maynard from all liabilities to him whatever, and give him a discharge in writing from his contract and a release in full, on payment of said sum awarded to said Norcross, after discharging all trustee processes now or then pending by said Norcross, so that said Maynard shall be free to pay said sum, then this obligation shall be void."

The award, which was signed by the arbitrators named by the parties, and also by a third arbitrator selected by those named, was as follows: —

"We, the undersigned referees in the case between Joseph W. Maynard and James H. Norcross, of Newton, after having examined the house, and hearing and seeing all within our reach relative to the case, also examining the account, hereby decide that a balance of three hundred and twenty-two dollars and four cents is due said Norcross."

It was in evidence, that Dowse and Whipple, the arbitrators named in the bonds of submission, came together for the purpose of examining the dwelling-house mentioned therein, and that after some discussion relative to the same, but before they had gone over the whole of the house, they concluded to choose some third person to act with them, and did accordingly appoint one Horn for that purpose. This appointment was agreed upon and made before the arbitrators knew whether they could agree. The defendant objected, that the arbitrators exceeded their authority in the appointment of an umpire before they had proceeded to examine the case.

It was also in evidence, that the defendant had been summoned as the trustee of the plaintiff's insolvent in five actions, which were commenced more than six months prior to the

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insolvency, and were entered in the court of common pleas, that the defendant appeared and filed general answers in such actions; and that further proceedings took place in the court of common pleas with reference to the same.

It further appeared in evidence, that subsequently to the insolvency of Norcross, and the assignment to the plaintiff, the defendant was defaulted and adjudged trustee in one of the actions above mentioned, and that an execution was issued on the judgment, by virtue of which, a demand had been made by an officer on the defendant, as trustee.

It appeared, also, that before this action was brought, the plaintiff exhibited to the defendant the assignment in insolvency, and demanded of him the money due on the award; and that the defendant thereupon admitted the award to be right, but objected to paying the amount due thereon or any part of the same, unless the plaintiff would allow and deduct therefrom all the costs to which he was entitled in the suits above mentioned, in which he was summoned as the trustee of the insolvent; which the plaintiff refused to do.

The defendant also called as witnesses the three arbitrators, and examined them as to their proceedings, and the grounds on which they made their award. The plaintiff objected, but his objection was overruled, and the testimony admitted by the court.

The defendant contended, that by the terms of the bond of submission from the defendant to the insolvent, the award was not to become binding upon him, or to be paid, until he was discharged from all liabilities to the insolvent, and until the insolvent had discharged the defendant, in writing, from his contract, and had also arranged all trustee processes against the defendant; all which stipulations, the defendant contended, were conditions precedent, to be performed by the insolvent or the assignee, before this action could be maintained.

Upon the facts and testimony above stated, the opinion of the presiding judge was, that there was no question for the jury, and he instructed them that the plaintiff was entitled to a verdict, which the jury returned accordingly, for the amount

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of the award; which verdict is to be set aside and a nonsuit entered, if the testimony of the arbitrators was rightly admitted, and if, upon that testimony, or for any other reason, the award was invalid; otherwise judgment is to be rendered on the verdict.

D. H. Mason, for the defendant.

F. W. Bigelow, for himself.

METCALF, J. The court are of opinion that the plaintiff is entitled to judgment on his verdict.

1. It was objected at the trial, though not urged at the argument, that the arbitrators exceeded their authority by choosing an umpire before they proceeded to examine the case. Assuming that such was the fact, it is clear that the objection is of no avail. Kyd on Awards, (2d ed.) 87; Watson on Arb. 58; *Bates* v. *Cooke*, 9 Barn. & Cres. 407; *Van Cortlandt* v. *Underhill*, 17 Johns. 405.

2. It is now objected, that the award is void, because the arbitrators have not therein said, as required by the submission, what deduction should be made from the sum which, by the terms of the building contract, the defendant had engaged to pay to Norcross for completing the building; and *Houston* v. *Pollard*, 9 Met. 164, is relied on to sustain this objection. But the decision in that case is not applicable, because the arbitrators, in the present case, by finding the balance which was due to Norcross, have also necessarily found what deduction should be made from the sum named in the building contract. The sum found due to Norcross, as a balance, shows the amount of such deduction as clearly as if the arbitrators had expressly stated the sum which they deducted.

3. The testimony of the two arbitrators who were called by the defendant, so far as it tended to impeach the award, was inadmissible. *Withington* v. *Warren*, 10 Met. 431. And it was treated as of no legal effect, in the instructions given to the jury.

4. Upon examining the conditions of the two arbitration bonds, the court are of opinion that the payment to the defendant of his costs in the trustee processes is not a

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condition precedent to his obligation to perform the award. The purpose of the parties seems to have been nothing more, than to fix the amount which the defendant should pay, and to secure him against a double liability therefor; namely, one on the award, and another on the trustee processes. But his liability on the latter was ended by the assignment of Norcross's estate, under the insolvent law, whereby the attachments under those processes, as well as other attachments of the insolvent's property, were dissolved. Whether the defendant has any remedy for the costs to which he would have been entitled, if the estate of Norcross had not been assigned, we have no occasion to decide. We merely decide that he has not a remedy by way of defence to the present action. He did not file any claim to these costs, in set-off, but he proceeded to trial, insisting, as he did when performance of the award was demanded *in pais*, that allowance of those costs was a condition precedent to his obligation to pay the sum awarded by the arbitrators. In this he mistook. *Judgment on the verdict.*

JAMES B. GREGG *vs.* HENRY WYMAN & another.

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If the owner of a horse knowingly lets him on the Lord's day, to be driven to a particular place, but not for any purpose of necessity or charity, and the hirer injures the horse by immoderate driving, in consequence of which he afterwards dies, the owner cannot maintain an action against the hirer for such injury, although it is occasioned in going to a different place and beyond the limits specified in the contract.

IN this action, which was brought to recover the value of a horse let by the plaintiff to the defendants, the declaration contained two counts, the first in trover for a conversion, and the second in case for the destruction of the horse by immoderate driving. The trial was before *Wells*, C. J., in the court of common pleas.

The plaintiff introduced evidence, that on Sunday, the 12th of July, 1846, he let a horse to the defendants to go to Chel-

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sea; that they went to Chelsea beach, a place different from the village of Chelsea, and from thence to Lynn and several other towns not on the route to Chelsea, but distant therefrom; that there was a material deviation from the route to Chelsea; that the defendants drove the horse, on certain parts of their journey, at great speed, and very immoderately; that the day was one of the hottest days of the season; and that the horse died very soon after he was returned home to the plaintiff's stable.

The defendants introduced evidence tending to show that there was not any hiring of the horse by them to go to any particular place; that they did not visit some of the places which the plaintiff's witnesses testified they did visit; that they did not drive immoderately; and that their journey was one of pleasure merely.

The defendants' witnesses, however, established, and it was conceded, that the route, which the defendants travelled home from Chelsea beach, was not the direct and ordinary route from Chelsea beach to Medford, where the plaintiff's stable was, but materially varied therefrom. It was also conceded, on both sides, that the hiring and the journey were both on Sunday.

On this state of facts, the defendants contended, that as the hiring was on Sunday, and not for the purpose of any work of necessity or charity, the contract was illegal, and, therefore, that the plaintiff could not recover.

But the judge ruled, that a hiring of a horse on Sunday, for the purpose of a pleasure drive, was of itself illegal, and that the plaintiff could not recover for any injury or damage done to the horse, while the defendants kept within the route specified by them at the time of the hiring: yet, that if the jury should be satisfied, that the defendants hired the horse to go to a particular place; that they went further or to a different place; and, that in consequence of their thus going further or to a different place, the plaintiff's horse died or was injured, the plaintiff could recover.

The jury returned a verdict for the defendants on the first count, and for the plaintiff on the second. They also stated

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to the court, that they found as a fact, that the plaintiff, at the time of the letting, knew that the horse was to be used for a pleasure excursion; but that the injury to the horse was occasioned by driving him beyond the limits specified in the contract of letting to hire.

The defendants alleged exceptions.

A. H. Nelson and *J. P. Converse*, for the defendants.

E. Buttrick, for the plaintiff. All the cases, in which a party has been defeated, by reason of the illegality of his contract, are where the action was for the consideration, or for compensation for performance. See *Simpson* v. *Bloss*, 7 Taunt. 246; *Cummings* v. *Perham*, 1 Met. 555; *Dedham Bank* v. *Chickering*, 4 Pick. 314; *Armstrong* v. *Toler*, 11 Wheat. 258. If the doctrine contended for on the other side is correct, why might not the defendants have killed the horse instantly, or done what they pleased with him? The ground of action here is not the contract, but the defendants' illegal act. If the contract was illegal, the defendants had no right to take the horse from the stable. The plaintiff's illegal conduct does not extend beyond the contract. The objection should not be carried further than the purpose of the law requires.

The opinion of the court was delivered at the October term, 1851.

Fletcher, J. By the Rev. Sts. *c.* 50, § 1, it is enacted, that "No person shall do any manner of labor, business or work, except only works of necessity or charity, on the Lord's day; and any person so offending shall be punished by a fine not exceeding ten dollars for every offence." By the second section it is provided, that "No person shall travel on the Lord's day, except from necessity or charity; and every person so offending shall be punished by a fine not exceeding ten dollars for every offence."

Letting the horse by the plaintiff was a matter of business, which he could not lawfully do on the Lord's day, and travelling with the horse for pleasure, by the defendants, was doing what they could not lawfully do on that day. The plaintiff, therefore, acted unlawfully in letting the horse, and

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he let him knowingly for an unlawful purpose. No person can maintain any action founded on such an unlawful proceeding. The authorities on this point are numerous and conclusive. In *Robeson* v. *French*, 12 Met. 24, it was decided, that an action cannot be maintained for a deceit practised in the exchange of horses on the Lord's day. The exchange of horses on that day was an unlawful transaction, the statute expressly prohibiting such business on the Lord's day. The decision was founded on the established principle, that the court will not lend its aid to a party who founds his action on an illegal transaction. So in *Bosworth* v. *Swansey*, 10 Met. 363, it was decided, that a person who travels on the Lord's day, neither from necessity nor charity, cannot maintain an action against a town for an injury received by him while so travelling, by reason of a defect in a highway, which the town was by law obliged to repair. The act of the plaintiff in that case, in travelling on the Lord's day, was unlawful, and being thus himself in fault, he had no right to call the defendants to account for their fault.

In the case of *Pattee* v. *Greely*, 13 Met. 284, it was decided, that an action cannot be maintained on a bond, which is executed neither from necessity nor charity on the Lord's day. This decision rests on the principle, that no man can come into a court of justice to seek the assistance of the law, who founds his claim upon a contravention of the law.

This general principle, as applied to acts prohibited by the provisions of the statute for the observance of the Lord's day, is fully sustained by numerous decisions both in England and in various states of the union. *Northrup* v. *Foot*, 14 Wend. 248; *Lyon* v. *Strong*, 6 Verm. 219, and two cases cited; *Berrill* v. *Smith*, 2 Miles, 402; *Fennell* v. *Ridler*, 5 B. & C. 406. The authorities on this point are very fully collected in the above case of *Pattee* v. *Greely*, 13 Met. 284, to which reference is made. The court below seems to have admitted the general principle, and to have ruled in effect that the letting was unlawful, and that the plaintiff could not recover for any injury or damage done to the horse, while the defendants kept within the route specified by them at the

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time of the hiring; yet, that if the jury should be satisfied that the defendants did hire the horse to go to a particular place, and that they went further or to a different place, and that, in consequence of their going further or to a different place, the plaintiff's horse died, or was injured, the plaintiff could recover.

By the instruction of the court, the jury were warranted in finding for the plaintiff, if they were satisfied that the defendants hired the horse to go to a particular place, and went further, and, that in consequence of going further, the horse died, or was injured. The jury found that the injury was occasioned by driving beyond the limits specified in the contract of hiring.

The question now is, Can the plaintiff by law maintain his action on this ground? The letting of the horse by the plaintiff was an act directly prohibited by the statute, and consequently an illegal act, and it is quite too clear for controversy, that no action can be maintained, founded on that illegal transaction. In *Holman* v. *Johnson*, 1 Cowp. 341, 343, lord Mansfield says: "No court will lend its aid to a man who founds his action upon an immoral or illegal act."

In the case of *Wheeler* v. *Russell*, 17 Mass. 258, the chief justice, in giving the opinion of the court, says: "No principle of law is better settled, than that no action will lie upon a contract made in violation of a statute, or of a principle of the common law."

It is also a well-settled principle of law, that if the plaintiff cannot make out his claim without showing an illegal act on his own part, he cannot maintain his action. If the plaintiff's own illegal act forms one link in his chain of title, that is a defective link, which cannot hold the chain together, and the whole must fail.

A party cannot be heard to allege his own unlawful act, and if such act be one of a series of facts necessary to support the plaintiff's claim, then that claim must fail.

The party who seeks redress in a court of justice must come with clean hands; an action which requires for its support the aid of an illegal act cannot be maintained. No

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action, therefore, can be maintained on an illegal contract, or upon any thing growing out of it. Whether a claim, connected with an illegal transaction, can be maintained in a court of law, may be determined by the test whether the plaintiff must bring in the illegal transaction to aid him in making out his case. There may, perhaps, be a class of cases, which would be considered as exceptions to this general principle, where the parties to an unlawful transaction are not regarded as *in pari delicto*, as in the case of usury, and perhaps some others. In these cases, a party to an illegal proceeding is sometimes allowed to maintain an action, as being an injured and oppressed person, and not equally guilty with the other party. The present case, however, does not fall within this particular class, but must be governed by the general principle, that a party cannot maintain an action when his own illegal act must be shown as a part of his case, and to make out his claim. This general principle is abundantly settled by decisions, to which it will be sufficient simply to refer, without going into any critical examination of the particular cases. *Simpson* v. *Bloss*, 7 Taunt. 246; *Booth* v. *Hodgson*, 6 T. R. 405; *Stokes* v. *Twitchen*, 8 Taunt. 492; *Howson* v. *Hancock*, 8 T. R. 575; *Worcester* v. *Eaton*, 11 Mass. 368, 376; *Babcock* v. *Thompson*, 3 Pick. 446; *Dwight* v. *Brewster*, 1 Pick. 50; *Wheeler* v. *Russell*, 17 Mass. 258; *Vandyck* v. *Hewitt*, 1 East, 96; *Morck* v. *Abel*, 3 B. & P. 35; *Fivaz* v. *Nicholls*, 2 M. G. & S. 500; *Roby* v. *West*, 4 N. H. 285.

In the case of *Simpson* v. *Bloss*, 7 Taunt. 246, 250, Gibbs, C. J., says: "Here the plaintiff pays ten guineas to the defendant, who was his partner in the bet, upon a confidence that he shall get the whole bet of twenty-five guineas from Brograve; and not being able to do so, he seeks by this action to recover it back. How can he make out his claim but by going into proof of the illegal transaction, on account of which it is paid? He says the payment was on a condition that has failed; and it is impossible to prove the failure of this condition, without going into the illegal contract, in which all the parties were equally concerned. We think,

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therefore, that the plaintiff's claim is so mixed with the illegal transaction that it cannot be established without going into proof of that transaction, and, therefore, cannot be enforced in a court of law."

In the case of *Fivaz* v. *Nicholls*, 2 M. G. & S. 500, 512, 513, Tindal, C. J., says: "I think this may be determined on short ground, that the plaintiff is unable to establish his claim as stated on the record, without relying upon the illegal agreement originally entered into between him and the defendant. This is an objection which goes to the very root of the action." Maule, J., says: "The principle has been conceded, that the plaintiff cannot recover, where, in order to sustain his supposed claim, he must set up an illegal agreement to which he himself has been a party."

In the case of *Phalen* v. *Clark*, 19 Conn. 421, 432, Church, C. J., in giving the opinion of the court, says: "We suppose it to be a well-settled doctrine, that, if a plaintiff requires any aid from an illegal transaction to establish his demand, he cannot recover." The difficulty in this case was in the application of this general principle to the particular facts of the case. The judgment of the superior court was reversed by the court of errors. Ellsworth, J., dissented from the opinion of the majority of the court of errors, and delivered a dissenting opinion, maintaining with great power of argument, that the plaintiffs could not make out their claim without showing their own unlawful acts, and that, therefore, upon the well-settled principles of law, they could not recover.

In the case of *Booth* v. *Hodgson*, 6 T. R. 405, 409, lord Kenyon, in answering certain arguments used in the case, says: "They say to the court, 'Suffer us to garble the case; to suppress such parts of the transaction as we please, and to impose that mutilated state of it on the court as the true and genuine transaction, and then we can disclose such a case as will enable our clients to recover in a court of law.' Such is the substance of this day's argument. It is a maxim in our law, that a plaintiff must show that he stands on a fair ground, when he calls on a court of justice to administer relief to him." Ashhurst, J.: "The plaintiffs wish us to

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decide this case on a partial statement of the facts; thereby admitting that if the whole case can be disclosed, they have no prospect of success; but we must take the whole case together."

It now remains to apply this well-settled general principle, that when the plaintiff cannot maintain his action without showing an illegal act on his own part, he must fail in his suit, to the present case.

Can the plaintiff maintain his action without showing, and invoking to his aid, his own illegal act in letting the horse?

The defendants are charged as wrong-doers in driving the plaintiff's horse; but how was their conduct in driving the horse wrongful? Doubtless, the plaintiff himself might have driven his horse as far and as fast, without being chargeable with acting illegally or wrongfully. Doubtless, the plaintiff might have given the defendants full authority to have driven the horse as far and as fast as they did drive him. The plaintiff might have let the horse to the defendants to go a given distance in a given time. The plaintiff might have employed the defendants to go upon his business, and to drive the horse as far and as fast as he was driven. Many cases may be supposed, in which the defendants might have done precisely what they did do, without doing any wrong to the plaintiff.

The defendants may have acted rightfully, or they may have acted wrongfully; and whether they acted rightfully or wrongfully must depend entirely upon the terms and conditions upon which they were using the horse, and what right they had to use him. It was indispensably necessary, therefore, for the plaintiff to maintain his case, and charge the defendants as wrong-doers, to show upon what terms and conditions the defendants were using the horse, and what right they had to use him, and that they had departed from those terms and conditions, and exceeded their right.

This was a necessary part of the plaintiff's case to be proved. Accordingly, the plaintiff offered evidence to prove, and did prove, that he let the horse to the defendants to go a particular specified distance; and the verdict for the plaintiff

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was found expressly on the ground, that the defendants went beyond this specified distance, and by so doing had done the damage to the plaintiff of which he complained. The plaintiff proved a special contract, and though the action was tort, yet the verdict was found against the defendants essentially on the ground that they had broken the contract, by driving the horse beyond the place specified, and by so doing had injured the plaintiff. It was only by showing his own illegal act and contract in letting the horse, that the plaintiff could show that the defendants had exceeded their right, and thus become wrong-doers. Though the action was in form tort, yet it was essentially founded on the breach by the defendants of the contract of letting. The defendants hired the horse to go to a specified place; but in violation of the contract of hiring, they went further, and thus became wrong-doers.

If the action be considered as essentially founded on the breach of the contract of letting, then it surely cannot be maintained, as the contract of letting was an unlawful contract, and no action can be maintained on an unlawful contract. But though the action be not considered as founded on the contract, still, to make the defendants wrong-doers, it was necessary for the plaintiff to show the contract of letting; that is to say, to make out his case, it was necessary for the plaintiff to show his own illegal conduct in letting the horse; and such being the case, by a very plain principle of law, he cannot maintain his action.

The act of the defendants, in driving beyond the place specified in the hiring, has been particularly considered, because the case turned upon that point. But the other point in the case, as to immoderate driving, would seem to come within the same principle. Whether, or not, the defendants were wrong-doers by driving the horse faster than they had a right to do, would depend upon their obligation, express or implied, growing out of the contract of hiring; so that upon this point the plaintiff would seem to be obliged to resort to his own illegal act, the act of letting the horse.

In truth, the plaintiff can hardly move at all in this case

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without being met by his own unlawful acts. It was unlawful for the defendants to travel for pleasure, as they did, on he Lord's day. In this unlawful act of the defendants, the plaintiff was himself directly implicated, by knowingly aiding and assisting the defendants, and furnishing them with the means of violating the law; so that the plaintiff could not prove that the defendants drove his horse at all, for a shorter or longer distance, or at a slower or faster rate of speed, without at the same time involving himself with them in violating the law by travelling for pleasure on the Lord's day.

How could the plaintiff be heard to say that he had let his horse to the defendants, knowingly, for the purpose of breaking the law, and ask for redress because the defendants, in using the horse in violating the law, — the purpose for which the plaintiff had knowingly let them have him, — had driven him too far, or too fast? But it is not necessary to dwell on this point.

The principle, that no court will aid a party who seeks to maintain his claim by proof of his own illegal acts, is not only a well-settled, but a most salutary principle of the law. It should be so. No party should be allowed to invoke the aid of the law by alleging his own illegal conduct. It is a sound and wholesome principle, that he who comes to ask the aid of a court of justice, should come with clean hands. The law for securing the proper observance of the Lord's day is a wise and salutary law, and he who tramples on that law should fully understand that he has no right to call on a court for aid to enforce a claim founded on his own unlawful act.

Exceptions sustained, verdict set aside, and new trial in the court of common pleas.

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Francis H. Bowers *vs.* The Suffolk Manufacturing Company.

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The proprietors of certain real estate in the city of L. laid out and constructed a street through the same, in the manner in which roads are usually built, with a carriage way in the centre, of the ordinary width, after which the street was and continued to be used by the public, without obstruction or objection: They afterwards conveyed a portion of the land, including a part of that over which the street was laid out, to the defendants, with a provision in the deed, that the street should be forever maintained as a road, for the common use of the parties to the conveyance, their successors and assigns, the grantees severally keeping in repair those parts which passed over their respective estates: The proprietors subsequently conveyed to the plaintiff a lot of land bounding on the street and so described, with all the privileges and appurtenances thereto belonging; and then sold at auction all their remaining lands on said street, together with other lands, declaring in the printed conditions of sale, that all the streets mentioned therein (including the street in question) should be reserved and kept open, for the benefit of the abuttors; but that any of them which were not graded might be altered or discontinued, with the consent of the abuttors thereon: And the city afterwards laid out that part of the street on which the plaintiff's lot was bounded as a public highway: It was held, that no intention on the part of the proprietors, to dedicate the street in question to public use, could be inferred from these facts, and that the plaintiff had a right of way in that part of the street not laid out by the city, for an obstruction of which by the defendants, he might maintain an action on the case.

It seems, that in this commonwealth, and especially since the St. 1846, *c.* 203, no public way can be established by dedication merely, and without the assent, express or implied, of the city or town, which will be bound by law to keep the same in repair.

This was an action on the case, for the disturbance of a right of way in a street in Lowell called Race street, which the plaintiff claimed as the owner of a lot of land with a dwelling-house thereon situated on said street. The case was tried before *Metcalf*, J., by whom it was reported for the consideration of the whole court. From the judge's report, it appeared, that on the trial, the plaintiff proved the following facts:—

Previous to January 1st, 1832, the Proprietors of Locks and Canals on Merrimack river owned the land over which Race street passed, and also on both sides of it, through its whole length. Sometime between 1829 and 1831, they laid out Race street, extending from Merrimack street, which was then a county road, to Hall street, which was another street laid out about the same time by them, but never laid out

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as a public street by the town or city of Lowell or by the county.

In 1830 or 1831 the proprietors proceeded to work the street, which they had so laid out, making a carriage way in the centre of it of the usual width, and in the usual manner in which roads are built, throughout its whole length. From the time this carriage way was so made, the street had been and was used by all persons who wished so to do, without objection, up to the time of the obstruction complained of in this action, and no barrier or gate had ever been set up in any part of it.

On the 1st day of January, 1832, the proprietors conveyed to the defendants the land lying on both sides of the northerly end of Race street, and the land over which the northerly end was laid out, by an indenture of two parts, containing the following provision: "And it is hereby agreed and covenanted by and between the parties, that the streets described in this indenture are to be forever maintained as roads for the common use of the parties hereto, their successors and assigns, each keeping in repair those parts which pass over their respective estates;" and referring to a plan, on which Race street was laid down fifty feet wide and extending from Merrimack street to Hall street. At the date of this conveyance, and for some time subsequent thereto, the proprietors continued to own all the remainder of the land lying on both sides of Race street. Printed signs, lettered "Race Street," were for several years fastened upon some of the dwelling-houses, where they abutted on Race street.

On the 7th of September, 1844, the proprietors conveyed to the plaintiff a lot of land, describing it as situated on Race street in Lowell, and as bounding thirty-nine feet on Race street, on one of its sides, with all the privileges and appurtenances thereunto belonging. On the lot so purchased by the plaintiff, he built, in 1845, a dwelling-house two stories high, in which he continued to reside up to the time of the trial. Before the plaintiff's purchase, four other lots on Race street had been sold by the proprietors to other persons.

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In April, 1845, the proprietors proceeded to sell at public auction all the land they owned on Race street, together with a large quantity of other lands in Lowell. The sale was made by a printed catalogue, with printed plans and conditions of sale. On these plans, Race street was laid down fifty feet wide, and extending from Merrimack street to Hall street; and the proprietors' land thereon was divided into twenty lots. One of the printed conditions of sale was as follows: "The streets mentioned in the catalogue and laid out on the plans are all to be reserved and kept open for the benefit of the abuttors, but they are not all graded. Any street reserved, and not graded, may be altered or discontinued with the consent of all the abuttors thereon." All the lots on Race street were sold at the auction to different individuals, and before the obstruction sued for in this action was made, twenty buildings had been erected, chiefly dwelling-houses, besides the boarding-houses of the defendants. It was admitted, that the defendants knew of the auction sale, and of the printed plans, and also of the conditions of sale, and made no objection thereto.

In 1846, the city of Lowell laid out a portion of Race street, extending from Merrimack to Dodge street, as a public street, and the plaintiff's lot was situated on the portion so laid out. In the spring of 1847, the proprietors, without the consent of the plaintiff, express or implied, dug up Race street about midway between Merrimack and Hall streets, and constructed a canal one hundred feet wide entirely across it, and raised the street where it crossed the canal about seven and one half feet, and in the course of the summer following, built on the west side of the street a bridge across the canal, twenty-eight feet wide. The plaintiff's house was situated between Merrimack street and the canal.

In June, 1847, the defendants commenced, immediately north of the canal, on the land conveyed to them in 1832, and on that part thereof not laid out by the city, digging up Race street; and between June and October, excavated in that place a hole about eighteen feet deep, extending across thirty feet of the width of Race street, and fifty feet of its

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length, and put in a wheel-pit with the necessary stone foundations, and also other foundations of stone on which a permanent and large building could be erected; which wheel-pit and foundations remained until the trial, rendering that part of Race street covered by them impassable.

The plaintiff offered evidence tending to show, that the pit and foundations were made for the purpose of erecting thereon, as soon as could conveniently be done, a brick mill which would cover over thirty feet of the width of Race street, and forty-nine feet of its length. The agent of the defendants was called by them to the stand, and testified that the defendants had no present purpose of erecting a mill over that part of the pit and foundations in Race street, though they made such pit and foundations, claiming a right to erect a mill over them, and now claimed that right; but they intended, for the present, to roof over the pit, raising it as high above the street as it formerly existed, as the bank of the canal, which was about seven and one half feet, and then so covering it over and sloping it off, that the surface could be used as a street; and that the defendants did not know, and had not determined, that they ever should erect a mill on the foundations so put in on Race street, though they claimed the right so to do.

While the defendants were digging the pit, and putting in the foundations, the canal aforesaid was in the course of being built by the proprietors, and no one could then or can now pass from that part of Race street immediately southerly of the place occupied by such pit and foundation, to that part of Race street so occupied; and the banks of the canal would have raised the street to the same elevation and slope as the agent of the defendants testified the roof over the pit and foundation would raise it.

No special damage was proved to have been suffered by the plaintiff.

Upon this evidence, the presiding judge was of opinion, that by force of the deed to the plaintiff from the proprietors of the locks and canals, and the conveyance to the defendants by the same proprietors, and the other facts in the case

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the plaintiff was entitled to a right of way in and over the length and breadth of Race street, and that the acts of the defendants, taking the testimony of their agent as true, were such an obstruction as would entitle the plaintiff to maintain this action.

A verdict for nominal damages was accordingly taken for the plaintiff, subject to the opinion of the whole court, on the above facts and evidence. If the opinion of the presiding judge was incorrect, then the verdict is to be set aside, and a new trial granted; otherwise judgment is to be rendered upon the verdict.

B. R. Curtis, for the defendants.

If Race street was a public highway, this action cannot be maintained, because no special damage was proved. All that is necessary to make a public way by dedication is, that the intention of the owner of the land to dedicate it to that use should distinctly appear from his acts and declarations; and that the public should, pursuant to that intention, actually enjoy the use of the way. Both these facts are clearly shown by the evidence in this case. *Hobbs* v. *Lowell*, 19 Pick. 405; *Springfield* v. *Hampden*, 10 Pick. 59, 67; *Valentine* v. *Boston*, 22 Pick. 75.

Being a public way, an obstruction therein is a public injury, and the appropriate remedy is by indictment. *Rex* v. *Lloyd*, 1 Camp. 260; *Rex* v. *Barr*, 4 Camp. 16; *State* v. *Catlin*, 3 Verm. 530.

The act of 1846, *c.* 203, has no application to this case: 1st, Because its effect is limited to an exemption of the town from the charge of maintaining the ways therein mentioned; and this exemption is quite consistent with the right of the public to use the way, and the duty of the land owner to refrain from obstructing it. See *Commonwealth* v. *Charlestown*, 1 Pick. 180. 2d, Because this way is not within the descriptive words of the first section; for it had not only been opened and dedicated to the public use, but it had become a public way long before the statute was passed. This statute, therefore, together with the case of *Hobbs* v. *Lowell*, would go far to prove that this way was chargeable

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on the town, if it were necessary to settle that point, which it is not.

Even if the plaintiff has any right by grant, such right is nothing superior to, or different from, the public right. Every thing in the deed to the defendants in 1832, is not only consistent with a dedication to the public as a highway, but it is consistent with nothing else. It had been laid out and built as a street, and was then in actual use by the public as such. It is called a street in the deed, and no such thing is known, either in a common or a legal sense, as a private street. The covenant, that the parties shall keep it in repair, is only an agreement between the parties, that each will repair so much as lies within his own land. *Rugby Charity* v. *Merryweather*, 11 East, 376, n.; *Woodyer* v. *Hadden*, 5 Taunt. 125; *Jarvis* v. *Dean*, 3 Bing. 447.

But the plaintiff did not acquire any special private right in the way. At the time of the deed to him, in 1844, it was a public street over which he in common with all others had a right to pass; and any injury to him was an injury to the whole public. The reason why a private action is not allowed for an obstruction to a public way is, that it would lead to a multiplicity of suits; for if one man might have an action, all men might have the like. Co. Lit. 56, a; *Williams's Case*, 5 Co. 72; *Boulston's Case*, 5 Co. 104. And why might not all men have the like here? They have the same right as the plaintiff, and they are injured to the same extent. Neither has suffered any special damage, and whatever is recovered is for a violation of the right, which belongs to them, as well as to him.

Even conceding that the deed conferred on the plaintiff a right, as against his grantors, that there should be a way there, and estopped them from denying, that there was a street or way to the extent of the land on that side, and implied that there was such a street; *Parker* v. *Smith*, 17 Mass. 413; *O'Linda* v. *Lothrop*, 21 Pick. 292, 297; the whole implication is satisfied by the existence of a public street there; indeed, it may be doubted whether any other way would

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satisfy the implied covenant, a public way then existing, and being described in the deed as "Race street." The language of the deed must be applied to the then existing state of facts and to the kind of way actually in use. *Clap* v. *M'Neil*, 4 Mass. 589.

J. G. Abbott, for the plaintiff.

WILDE, J. This was an action on the case for a disturbance of the plaintiff's right of way in and over a certain street in the city of Lowell, called Race street. Upon the facts and evidence reported, the presiding judge at the trial was of opinion, that the plaintiff was entitled to maintain his action; and a verdict was thereupon taken in his favor for nominal damages, subject to the opinion of the whole court. The truth of the facts stated by the witnesses was not disputed at the trial, and they are to be taken as true.

Upon these facts, we think it very clear, that the plaintiff, by a grant from the proprietors of the land over which Race street had been laid out by them, did acquire a good title to the right of way claimed, for the disturbance of which the defendants are liable, unless they can maintain the ground taken in the defence.

The defendants maintain that Race street was a public way by dedication by the proprietors of the land; and if so, that a nuisance therein is indictable as for the violation of the public right, but that no private action can be maintained except for special damages; and that no such damages were proved or claimed in the present case. This ground of defence, we are of opinion, may be well maintained, if in fact Race street was a public way. This fact it is incumbent on the defendants to prove, and the question is, whether it does clearly and distinctly appear by the facts and evidence reported.

It has been argued, that all which was necessary to make such a way by dedication is, that the intention of the owner of the land to dedicate it to public use should distinctly appear from his acts and declarations; and that the public should, pursuant to that intention, actually enjoy the use of the way.

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But if such be the law, we are nevertheless of the opinion, that the defence cannot be maintained. The facts proved and reported fail to indicate an intention of the proprietors of the land to dedicate the street in question to public use. It is true, that it was laid out by them as a street; that they in 1830 or 1831 built a carriage way over it in such manner as is usual in working and building public streets; and that from the time this carriage way was made until the spring of 1847, the way was used by the public without obstruction or objection. If these had been all the facts proved, we do not doubt, that the intention of the proprietors to dedicate the way to public use might be reasonably inferred. But other facts were proved at the trial, which appear to the court to be inconsistent with such an intention. In the first place, it appears by the conveyance of a lot of land, over which Race street had been laid out, from the proprietors to the defendants, that the streets described in the conveyance (including Race street) were to be forever maintained as roads for the common use of the parties thereto, their successors and assigns, each keeping in repair those parts which passed over their respective estates. And it appears also, that afterwards the proprietors sold at public auction all their land on Race street, and that one of the printed conditions of sale was as follows, namely: "The streets mentioned on the catalogue and laid out on the plans (which included Race street) are all to be reserved and kept open for the benefit of the abuttors, but they are not all graded. Any street reserved and not graded may be altered or discontinued with the consent of the abuttors thereon."

These facts certainly indicate no intention of dedicating these streets to public use, but quite the contrary. The proprietors knew, doubtless, that while the streets remained open, the public would use them as occasion might require, and to such use they had no objection, for they made none; yet such use was incidental; the streets were not laid out for that purpose, but for the use and accommodation of the abuttors thereon, and a right was reserved to them to alter or discon-

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tinue any street which had been reserved but not graded These facts are entirely inconsistent with an intention of dedicating these streets to public use, and are decisive of the case.

But if the evidence were otherwise, and the intention of the proprietors of the land to dedicate these ways to the use of the public had been distinctly and clearly proved, we are by no means of opinion, that this defence could be maintained On the contrary, we are strongly inclined to the opinion, that whatever may be the law in England, in this commonwealth, no public way can be established by dedication merely, and without the assent, express or implied, of the city or town bound by law to keep it in repair. If such were not the law, any land owner, as Morton, J., justly remarks in *Hobbs* v. *Lowell*, 19 Pick. 405, 411, might for his own interest, and without regard to public convenience or necessity, establish a highway and subject the town within which it lies to the burden of supporting it. The question, however, was not decided in that case; as it was proved that the dedication of the road was acquiesced in by the surveyors of highways, the selectmen of the town, and the town itself in which the road was laid out. And it seems to be clearly intimated, that if it had been necessary to decide the question, it would have been decided, that without such acquiescence the way would not have been considered as a public way. The chief justice, in delivering the opinion of the majority of the court, refers to the case of *The King* v. *Leake*, 5 B. & Ad. 469, in which it was held, that to constitute a highway by dedication, the assent of the parish was not necessary; and after speaking of such a doctrine, he adds: "It is manifest, however, that there is very little analogy between the character, powers and duties of parishes in England, and those of towns in this commonwealth." And certainly there seems to be no good reason, why such a hardship should be imposed on cities and towns, without their assent, and without any opportunity to make their objections; when, as Morton, J., remarks in *Hobbs* v. *Lowell*, "proper tribunals are empowered to inquire when

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and where new roads are needed, and to proceed to lay out such as the public exigencies may require, having due regard to private rights and public burdens."

But if there were any doubts on this point previous to the St. of 1846, *c.* 203, it seems to me they must be removed by that statute. The statute provides, that no way heretofore opened and dedicated to the public use, and not already become a public way, shall become chargeable upon any city or town of this commonwealth, unless such way shall be laid out and established by the city or town, in the manner prescribed by the statutes of this commonwealth. It has been argued, for the defendants, that this way is not within the descriptive words of the statute, because it had become a public way long before the statute was passed. But it appears to me, that it is a much more reasonable construction of the statute, to hold that the ways referred to, as having been dedicated and become public ways, were such as the way in Lowell which had been adjudged a public way, and as to which the dedication had been assented to or acquiesced in by the town, and not to ways like that in this case, where no such assent or acquiescence had been proved; but as to which, on the contrary, it was proved, that in 1846, the city of Lowell laid out a portion of said Race street as a public street. If the way became a public way as soon as used, without the assent of the city of Lowell, it might become a public way immediately after it was laid out and dedicated and prepared for use, for it might then be used by the public; and so is the law in England, as it was laid down in the case of *Woodyer* v. *Hadden*, 5 Taunt. 125, 137: "No particular time," it is said, "is necessary for evidence of a dedication; it is not, like a grant, presumed from length of time; for if the act of dedication be unequivocal, it may take place immediately; for instance, if a man builds a double row of houses opening into an ancient street at each end, making a street, and sells or lets the houses, that is instantly a highway."

It cannot, we think, be inferred from the language of the statute that it was intended to sanction such a doctrine, as

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the law of Massachusetts; for if such were the law, no one could suppose that there was a way in the commonwealth, which had been dedicated to public use, which had not also become a public way.

It has been also argued for the defendants, that the exemption of the city from the charge of maintaining the way in question is not inconsistent with the right of the public to use the way, and the duty of the land owner to refrain from obstructing it. This is only true in part. The land owner, in such case, may not be entitled to maintain trespass against any one who might pass over it while it remained open, but he might shut up the way, and the right of passing over it would thereby be terminated; the opening of the street amounting to a license, and not to a grant or dedication. And it is very clear, that no indictment for a nuisance on such a way could be maintained. By the second section of the statute above referred to, the mayor and aldermen of each city, and the selectmen of each town in the commonwealth, are required, whenever the public safety may demand it, to cause the entrances of all such ways to be closed up, in order to caution the public against entering thereupon.

Such ways, therefore, cannot be considered as public ways; for if they had been so considered, cities or towns would have been bound to keep them in repair, instead of closing up the entrances, as required by the statute.

For these reasons, we are strongly inclined to the opinion, as before remarked, that the defence in this case could not be sustained, although it were admitted, that the proprietors of the land did lay out and open the way in question with the intention to dedicate it to the public use, there being no evidence of the assent of the city of Lowell to such dedication; but, on the contrary, a portion of the said way was laid out by the city as a public street in 1846, long after the supposed dedication. *Judgment on the verdict.*

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Joseph Raynes *vs.* The Lowell Irish Benevolent Society & Trustee.

Money belonging to the L. I. B. Society was placed by their president in the hands of D. C. for the purpose of being deposited for the society in an institution for savings; D. C. accordingly deposited it, the entry thereof in the books of the institution and in the deposit book given to D. C. being, "D. C. in trust for the L. I. B. Society;" subsequently other sums of money belonging to the society were deposited by another individual, in whose hands they had been placed for that purpose, and were entered, in the same form, in the books of the institution, and in the deposit book given to D. C. It was held, that the money thus deposited was the money of the L. I. B. Society, and that the institution for savings was chargeable therefor as their trustee; although it appeared that the treasurer of the institution supposed and believed, that the deposits were made with the understanding that they were wholly under D. C.'s control, and subject only to his order, and that the institution had invariably held itself answerable to the individual depositing the money.

In this case, which was argued by *J. G. Abbott*, for the plaintiff, and by *J. P. Robinson*, for the Lowell Institution for Savings, summoned as trustee, the material facts appear in the opinion of the court.

Metcalf, J. The question, whether the Lowell Institution for Savings is chargeable as trustee of the principal defendants, is submitted to the court, not only upon the answer of the treasurer of the institution, but also upon two depositions, which are filed in the case, and which the parties have agreed shall "be taken as true." So far, therefore, as those depositions differ from the answer, they must be held to control it.

It appears from the answer and from the depositions, that $50 were deposited in the institution, by Dennis Crowley and others, on the 20th of March, 1847; that the entry thereof, in the books of the institution, and in the book given to Crowley, was in the name of "Dennis Crowley, in trust for the Lowell Irish Benevolent Society;" and that this was the money of that society, and was placed by the president thereof in the hands of Crowley and others, for the purpose of their depositing it for the society. It also appears that afterwards, at different times, various sums of money, belonging to the society, were deposited by Thomas Downing, their treasurer, in said institution, and were entered in its

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books, and in the book given to Crowley, which was in Downing's possession, in the same manner as the deposit of the $50 was made, viz., in the name of "Dennis Crowley, in trust," &c. It further appears that Crowley is dead, and that no administration on his estate has been granted; and it does not appear that he ever paid over any part of the money to the society, or in any way accounted with them for it.

On these facts, the court cannot doubt that the money of the Irish Benevolent Society is so "intrusted and deposited in the hands and possession" of the Savings Institution, that the institution is chargeable as the trustee of the society. And the only remaining question is, whether the other matters, stated in the answer of the treasurer of the institution, so vary the legal effect of the foregoing facts as to entitle the institution to a discharge from this process. The treasurer states that he presumes that all the deposits were made by Crowley; but the depositions show that only the first was made by him. The treasurer also supposes and believes that the deposits were made with the understanding that they were wholly under Crowley's control, and subject only to his order. He also says that the institution has invariably held itself answerable to the trustee depositing the money. But this understanding of the institution, even if it were also the understanding of Crowley and Downing, cannot alter the law of the case. Nor can the law be altered by the views which the institution has always held respecting its liability to the person who makes a deposit in trust for another.

The deposits that were made by Downing seem to have been made in the name of Crowley, because the first was so made, and the institution did not choose to open a new account with a new trustee of the same *cestui que trust;* or because the institution did not know Crowley's person, and supposed Downing, when he presented the book in which the first entry was made, to be Crowley. However this may have been, all the deposits were in trust for the society that owned all the money deposited. This being so, the money was subject to attachment, upon the trustee process, by the society's creditors, and the institution is held as trustee of

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the society, and must be charged as such, in this action. By paying the money to the plaintiff, the institution will discharge itself from all claims that can be hereafter made upon it by the society, or by Downing, or by the personal representatives of Crowley. *Trustee charged.*

ROYAL CALL *vs.* JOHN BUTTRICK.

A. conveyed a lot of land to B., who at the same time mortgaged it back; B. quitclaimed to C., who made a sealed lease to D. and E., and their assigns, of the right and privilege of digging a well in the land and of conducting water therefrom to their houses; about the same time, A., after entry for foreclosure, but before foreclosing his mortgage, undertook to confirm the lease by an instrument under seal, but not acknowledged, and afterwards quitclaimed the land to C. and F., with a covenant against all claiming under him or his heirs; C. afterwards conveyed all his interest in the land to D., who had meanwhile also become the owner of E.'s house: It was held, that D. had sufficient title in the well to enable him to maintain an action on the case for a corruption of the water therein by means of a cesspool sunk in the ground near by, no plea in abatement having been filed to the nonjoinder of E. or of F.; and that it was immaterial whether B. had released his equity of redemption to A. before A. confirmed the lease.

A deed of real estate, though not acknowledged, is good against the grantor, his heirs and devisees.

An action on the case for a nuisance is not abated or barred by a subsequent abatement of the nuisance by the plaintiff.

THIS was an action of trespass upon the case, commenced on the 22d of May, 1847, in which the plaintiff alleged that he was, and for ten years before action brought had been, the owner of a well of water in Lowell, and had the right to take the water from the well, in its natural purity; but that the defendant had injuriously dug a deep hole in the ground near the well, and conducted into the hole great quantities of filthy water, &c., which penetrated and flowed from the hole through the earth into the well, and rendered the water of the well unfit for use.

The trial was before *Fletcher*, J., who made the following report thereof:—

The plaintiff introduced evidence, showing that Sidney Spaulding and five others, on the 28th of April, 1832, made a deed of the land in which the well in question was sunk,

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to Peter E. Sanborn, who, on the same day, mortgaged the land to the grantors, to secure part of the purchase money; that Spaulding took possession of the land on the 9th of May, 1833, for condition broken, and for the purpose of foreclosure; and that on the 5th of August, 1833, the five other mortgagees assigned all their interest in the mortgage to Spaulding; that Sanborn, the mortgagor, on the 2d of June, 1832, made a quitclaim deed of part of the land to Avery Marshall, which deed contained a condition that Marshall should appropriate the land for a street, so long as he should own the adjoining land on the south, with his brothers; that Avery Marshall and Luther Marshall, on the 28th of July, 1835, by a sealed instrument, leased and demised to the plaintiff and Solomon Phelps, and their executors, administrators and assigns forever, "the right and privilege of digging a good and sufficient well of water on the easterly side of our land, on the south side of a street called Middlesex street, being the lot conveyed to said Avery by Peter E. Sanborn, and to conduct the water from the same through said land, in the most convenient course, to accommodate said lessees' houses lately erected on the bank of Pawtucket canal."

It appeared that all the foregoing conveyances, except the last, were recorded soon after they were executed; but that the last (the lease) was not recorded until May 16th, 1840. At the foot of this lease was the following memorandum: "I, Sidney Spaulding, of said Lowell, mortgagee of said premises, do hereby consent to said lease, and do release to said Call and Phelps the privilege above granted. Sidney Spaulding. (seal.") This memorandum was recorded with the lease, though it was not acknowledged by Spaulding before a magistrate, until August 17th, 1847; and on the next day it was again recorded.

It was in evidence that the land, in which the well was sunk, was a part of Grand street, which was first laid out by public authority in the year 1846; but that it had been used as a street for many years previously.

The following facts also appeared in evidence: On the 5th of May, 1836, Sidney Spaulding made a quitclaim deed

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o Luther Marshall, Avery Marshall and Hezekiah Marshall, of the land in which the well was, "for the purpose of a street; the premises forever to be kept open as a street;" and covenanted against the claims of his heirs, and all persons claiming from or under him or them. This deed was recorded on the 7th of March, 1840. On the 20th of May, 1847, (two days before this action was commenced,) Avery Marshall conveyed to the plaintiff all said Avery's right and title to all that part of Grand street, laid out between Middlesex and Marshall streets; reserving to said Avery, and to his heirs and assigns, "the right to dig and use one or more wells on said premises, in such place or places as not to injure any wells which said Call has dug or may dig thereon; this conveyance being made upon the express conditions, that said premises shall be forever kept open as a public street, and that said Call, his heirs and assigns, shall never sell a right to any other person to dig a well thereon." On the 23d of August, 1847, (three months after this action was commenced,) Hezekiah Marshall made to the plaintiff a deed like the one last mentioned. Both these deeds were recorded on the next day after they were dated. On the 12th of January, 1837, Solomon Phelps conveyed to the plaintiff, in mortgage, his house and estate on Pawtucket canal, "with all the privileges and appurtenances thereunto belonging." And the plaintiff introduced evidence that he took possession of said house and estate, for the purpose of foreclosure, on the 5th of August, 1837, and had ever since had exclusive possession thereof.

Evidence was also given, that in October, 1846, the defendant and Josiah N. Short and Joseph Woodbury made a sewer and the cesspool complained of in the plaintiff's declaration, in Grand street, near the well claimed by the plaintiff, opposite to, and on the side of, said street, next to the house and land of the defendant, and between Middlesex and Marshall streets. The defendant (then denying that the plaintiff had any sufficient title to the well) put in a deed from Sidney Spaulding to the defendant and Short and Woodbury, dated August 5th, 1847, and recorded on the

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next day, and a deed from Spaulding to Woodbury, dated November 1st, 1847, and recorded on the 4th of November; which two deeds conveyed the entire lot of land in which the well was sunk, but not the cesspool nor sewer. The plaintiff contended that these deeds were incompetent evidence, in any stage of the trial, inasmuch as they were executed since the commencement of this action.

It was conceded, for the purposes of the trial, that said well was dug in the year 1835, and had been in constant use by the plaintiff and his tenants, until about seven months after the cesspool was finished; and that the cesspool was filled up by the plaintiff, on the 29th of June, 1847; also, that the defendant and Short and Woodbury, before the 5th of August, 1847, had seen and obtained a copy of the above-described memorandum of Spaulding, at the foot of the lease aforesaid.

The judge, in order to obtain a decision of the whole court upon the sufficiency of the plaintiff's title, advised a nonsuit, which was entered. If, upon the foregoing facts, and upon examination of all the said deeds and instruments, the court shall be of opinion that the plaintiff had no sufficient title to the well when this action was commenced, the nonsuit is to stand; otherwise it is to be taken off, and the case is to stand for trial.

G. F. Farley and *S. Ames*, for the plaintiff.

B. F. Butler, for the defendant, cited to the point that Luther and Hezekiah Marshall should have been joined as plaintiffs, and, that this being a personal action, their non-joinder might be pleaded in bar, *May* v. *Parker*, 12 Pick. 34; *Gilmore* v. *Wilbur*, 12 Pick. 120; as to the necessity of the acknowledgment of Spaulding's memorandum of confirmation, *Carter* v. *Champion*, 8 Conn. 549; *Blood* v. *Blood*, 23 Pick. 80, 82; and as to the abatement of the suit by filling up the cesspool, 16 Vin. Ab. Nusance, X., and cases there cited; 3 Bl. Com. 220.

The opinion of the court was delivered at the October term, 1851.

Metcalf, J. The state of the plaintiff's title to the well

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and to the use of the water in it, when he commenced his action, is shortly this: Sidney Spaulding and others owned the land on the 28th of May, 1832, and then conveyed it to Peter E. Sanborn, who, at the same time, mortgaged it back to them. On the 2d of June following, Sanborn gave a quitclaim deed of that part of the mortgaged land, in which the well is, to Avery Marshall, who, together with Luther Marshall, on the 28th of July, 1835, made a sealed lease to the plaintiff and Solomon Phelps, and their assigns, of the right and privilege of digging a well in the land, and of conducting the water thereof to their houses on Pawtucket canal. About the same time, (as we understand,) Spaulding, who had become assignee of his co-mortgagees, undertook to confirm the lease aforesaid, by an instrument signed and sealed by him, but not acknowledged until after this action was brought; and on the 5th of May, 1836, he made a quitclaim deed to Luther, Avery and Hezekiah Marshall, of the lot of land in which the well was, and covenanted against all claims that any persons might make to the quitclaimed premises through or under him or his heirs. On the 20th of May, 1847, (two days before this action was brought,) Avery Marshall conveyed to the plaintiff all said Avery's right and title to the land aforesaid. The plaintiff, as early as the year 1840, became the sole owner of Solomon Phelps's house and estate on Pawtucket canal, (to which the aforesaid lease gave liberty to convey water from the well,) with all the privileges and appurtenances belonging thereto. The plaintiff and his tenants also had the uninterrupted use of the well and the water in it, from the year 1835 until near the time when this action was commenced. And it does not appear that the defendant, before this action was commenced, had any title or claim to the land.

Upon examining these facts and conveyances, we are of opinion, that the plaintiff had a sufficient title to the well, when this action was commenced. He had a lease and grant from Sanborn, who had previously mortgaged the land, and a confirmation of that lease and grant, by Spaulding, the holder of the mortgage; thus acquiring a title from the

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only parties who appear to have had any power to confer title.

It was objected, that this deed of confirmation by Spaulding was invalid, because it was not acknowledged by him before this action was brought. But, as against Spaulding, and his heirs and devisees, it conveyed a title, although it was not acknowledged. *Dole* v. *Thurlow*, 12 Met. 157.

If, however, this deed of confirmation were not valid, there is another ground upon which we are of opinion that the plaintiff's title, at the commencement of his action, was sufficient. Spaulding conveyed and released the land to the three Marshalls, and Avery Marshall afterwards conveyed all his right and title to the plaintiff. It does not appear whether Spaulding had an indefeasible title, when he conveyed to the Marshalls. That conveyance was four days before the expiration of three years from the time of Spaulding's entry for foreclosure. The mortgage, therefore, was not then foreclosed. And whether he had obtained a release of Sanborn's equity of redemption, we do not learn from the report of the evidence. Nor is it material. For as Sanborn had granted to the plaintiff the right to dig and use the well, neither he nor his heirs or assigns could have defeated that grant, even if the mortgage had been redeemed after Spaulding's conveyance to the Marshalls. And if Spaulding, after that conveyance, foreclosed the mortgage, the foreclosure enured to the benefit of the Marshalls and their assigns.

It was contended for the defendant, that if the plaintiff's title was derived solely from Avery Marshall's conveyance to him, this action must fail, because Luther and Hezekiah Marshall should have joined as plaintiffs; and that if the plaintiff's title was sufficient under Sanborn's conveyance, and Spaulding's confirmation thereof, then Solomon Phelps should have joined in bringing this action. But if it were certain that the plaintiff is tenant in common of the well, the nonjoinder of his co-tenants could be excepted to only by plea in abatement, though he would be entitled to recover damages only *pro interesse suo*. 1 Saund. 291, *g*, *h*. *Addison* v. *Overend*, 6 T. R. 770. Whether the plaintiff has

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acquired Phelps's right to the use of the well, is a question on which the evidence given at the trial does not enable us to form an opinion.

It was also objected against the maintenance of this action, that the plaintiff has filled up the defendant's cesspool, since the commencement of the action; and it was urged, that an abatement of a nuisance by a plaintiff, after suit brought to recover damages for levying it, abates the suit, or is a bar to it. The authorities cited in support of this position relate to the processes of assize of nuisance, and *quod permittat prosternere*. And in those processes, while they were in use in England, the law was so. But it is otherwise in actions on the case to recover damages for a nuisance. *Kendrick* v. *Bartland*, 2 Mod. 253, and 1 Freem. 230; *Pierce* v. *Dart*, 7 Cow. 609; *Gleason* v. *Gary*, 4 Connect. 418; *Tate* v. *Parrish*, 7 T. B. Monr. 327.

Without considering the effect of the deeds which bear date since this action was brought, we are satisfied that the other deeds show such a title as authorized the plaintiff to bring the action. The nonsuit is, therefore, to be taken off and the case is to stand for trial.

Paul R. George *vs.* John Putney.

Where a judgment creditor levied his execution upon real estate of his debtor, which was then under a lease for years and in the occupation of the tenant; and before the rent became due and payable, entered upon the premises, claiming title, and threatened the tenant to put him out, unless he would yield possession and attorn to such creditor; whereupon the tenant agreed in writing to hold the premises under him; it was held, that such entry and disturbance, although not an eviction, in a technical sense, were equivalent to an ouster, and that the tenant was not afterwards liable to the lessor for the rent.

4c 351
148 [illegible]
4c 351
158 291
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167 302

This was an action of assumpsit for the recovery of $50, for the use and occupation of a store, under the First Free-will Baptist Meeting-house in Lowell, from the 1st of January to the 1st of April, 1847.

The defendant pleaded the general issue, and specified in

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defence a paramount title to the premises in Benjamin F. Butler, Thomas Hopkinson, and Tappan Wentworth, and an eviction by them.

The case being tried in the court of common pleas, before *Wells*, C. J., it was in evidence on the part of the plaintiff, that being in possession of the premises, claiming title thereto, in the latter part of the summer of 1846, he by his agent made a parol lease or agreement with the defendant, that he should occupy the store at the rate of $50 a quarter; that the defendant accordingly entered and occupied the store from some time in September, 1846, to the 1st of January, 1847, and paid the rent to the plaintiff to that date; and that the defendant continued to occupy the store until the 1st of April, 1847, the contract being from quarter to quarter, ending on that day, when the plaintiff's agent demanded the quarter's rent then due, which the defendant refused to pay. Upon this evidence, the plaintiff rested his case.

The defendant then proved, that Butler, Hopkinson and Wentworth, on the 29th of March, 1847, entered upon the premises claiming title, and threatened the defendant to put him out, unless he would yield the possession and attorn to them; and the defendant thereupon gave them a writing, acknowledging that he held the premises as a tenant under them

The plaintiff objected to the admission of any evidence of title in Butler and others, inasmuch as the plaintiff had been in quiet possession, and the defendant had entered and occupied by the plaintiff's permission, and as tenant under him. But the presiding judge ruled, that the entry by Butler and others was an eviction; that if they had a better title than the plaintiff, the defendant might show it in this action; and that such title would defeat the plaintiff's claim.

The defendant thereupon proved, that on the 1st of August, 1835, the estate of which the premises in question were parcel was conveyed by the Proprietors of the Locks and Canals on Merrimack river to the plaintiff, who gave a mortgage back of the same to the grantors, to secure the payment of the sum of $7703, at the end of ten years; and that this mortgage was duly assigned, on the 15th of March, 1844, to

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Josiah B. French, who entered on the premises for condition broken on the 20th of October, 1845.

The defendant further proved, that the plaintiff, on the 26th of November, conveyed the premises to Ira Frye, who, on the 10th of October, 1836, conveyed the same to the proprietors of the First Freewill Baptist Meeting-house in Lowell; that at the October term, 1843, of this court, one Andrew J. Wiggin recovered judgment against the said proprietors and levied his execution on one undivided seventy-eighth part of the premises, which was set off to him; that at the December term, 1843, of the court of common pleas, one Jesse Swain recovered judgment against the said proprietors, and levied his execution on all their remaining right in equity in the premises, which was conveyed to him; that the said Wiggin and Swain, in February, 1846, conveyed all their interest in the premises to the said Butler and others, that Butler and others, in June, 1846, paid French the amount due on the plaintiff's mortgage of the premises to the Proprietors of the Locks and Canals, assigned to him; and that French, on the same day, acknowledged satisfaction of the mortgage on the record.

The plaintiff introduced no further evidence of title than as above stated, but relied on his possession, claiming title in virtue of an entry by Ira Frye, for the breach of sundry conditions contained in his deed of October, 1836, and a deed from Frye to the plaintiff, and his possession and contract with the defendant. But the plaintiff did not offer evidence to prove a breach of any of the said conditions; and he admitted, for the purposes of the trial, that the evidence on the part of the defendant, if admissible, which he denied, showed a *prima facie* title by record in the said Butler and others.

But the judge ruled, that the evidence was admissible; that the entry by Butler and others, on the 29th of March, 1847, was an eviction by paramount title; and directed the jury to find a verdict for the defendant, which they accordingly did.

The plaintiff thereupon alleged exceptions.

J. P. Robinson, for the plaintiff, cited *Binney* v. *Chapman*,

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5 Pick. 124; *Boston* v. *Binney*, 11 Pick. 1; *Balls* v. *Westwood*, 2 Camp. 11; *Watertown* v. *White*, 13 Mass. 477, 481; *Hill* v. *Boutell*, 3 N. H. 502; *Galloway* v. *Ogle*, 2 Binn. 468; *Cooke* v. *Loxley*, 5 T. R. 4; *Cobb* v. *Arnold*, 8 Met. 398, 402; *Cobb* v. *Arnold*, 12 Met. 39; *Codman* v. *Jenkins*, 14 Mass. 93.

B. F. Butler, for the defendant.

Wilde, J. This was an action of assumpsit for the use and occupation of a store, which had been let by the plaintiff to the defendant by a parol lease; and the question at the trial was, whether, upon the facts proved, the plaintiff was entitled to recover. It was ruled by the presiding judge, that he was not; and to this ruling the plaintiff excepted. In support of his exception, he relies upon the well-settled rule of law, that in an action for the recovery of rent reserved in a lease by the lessor against the lessee, the defendant is not allowed to plead *nil habuit in tenementis;* for he is estopped to deny the lessor's title, by whose permission he has entered upon and occupied the premises. And this is not a mere technical rule, but is conformable to the contract between the parties; for so long as the lessee is not disturbed in his occupation, he is bound by the contract to pay the rent, whether the lessor's title be defective or not.

But it is equally well settled, that if the lessee is disturbed in his occupation by a party having a title paramount to that of his lessor, so that he cannot legally continue his occupation under the lessor, without rendering himself liable as a trespasser to the other party, he may yield the possession, and take a new lease under him, or he may abandon the possession; and in either case he will thereafter not be liable to pay rent to the original lessor. Such an entry and disturbance are equivalent to an ouster. And this was the defence in the present case. It was proved that the plaintiff was divested of his title by the levy of two executions on the premises, and that the execution creditors, before the rent sued for became due and payable, entered upon the premises, claiming title, and threatened to put the defendant out, unless he would yield possession and attorn to them; and that thereupon he did agree in writing to hold the premises under them.

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This evidence was ruled to be admissible, and that it was sufficient to prove an eviction by paramount title. And this ruling was, we think, substantially correct; for although it was not evidence of an eviction in its technical sense, it proved an ouster, or that which is equivalent thereto, and to an eviction under a judgment.

It seems to be well settled, that if a lessee under a defective title is disturbed by a party having a paramount title, he is not restrained by his lease from purchasing the paramount title, without the consent of his lessor, although he had not been evicted or ousted. But in such a case, to avoid liability for rent, the lessee is bound to renounce the lessor's title, and to surrender to him the possession; after which he may bring his action to try his title. No such surrender of possession was required in the present case. *Chambers* v. *Pleak*, 6 Dana, 426, 429; *Lunsford* v. *Turner*, 5 J. J. Marsh. 104; *Greno* v. *Munson*, 9 Verm. 37.

So in an action for a breach of the covenant of warranty in a deed of conveyance of real estate, it has been held, that the grantee may yield possession of the granted premises to a party, having a title paramount to that conveyed to him by his grantor, and who threatens to eject him if he refuses to yield possession; for he is not obliged to involve himself in a lawsuit to defend himself against a title which he is satisfied must ultimately prevail; and on proof of such title, he may maintain an action on the covenant of warranty. *Hamilton* v. *Cutts*, 4 Mass. 349, 352.

It was argued for the plaintiff, that the title to real estate is not to be tried in an action of assumpsit. But the cases cited do not support the argument as applicable to the present case. The case of *Codman* v. *Jenkins*, 14 Mass. 93, was an action of assumpsit for use and occupation, brought by the heirs of Anne Austin, against the lessee of her husband, John Austin, whose title to the demised premises ceased by her death; and it was held, that the action could not be maintained, although the plaintiffs' title was paramount to the defendant's lessor's. But that case was decided on the ground, that the plaintiffs had never entered upon the prem-

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ises, or had demanded possession or rent of the defendant, who continued to occupy under the lease, and not by the permission of the plaintiffs. This decision, therefore, is rather in favor of the defence, than in support of the present action, for if the plaintiffs had, after the death of their mother, demanded the rent due of the lessee, they might have well maintained their action; and so the law has been settled in several cases.

In *Moss* v. *Gallimore*, 1 Doug. 279, 282, one Harrison had demised certain premises to the plaintiff, and afterwards mortgaged the same to the defendant, who demanded the rent of the tenant, and on non-payment he distrained; and the distress was held to be justified, on the ground, that by the mortgage the lessor's reversion in the demised premises passed, with the title to the rent, as incident thereto, to the mortgagee; and that the attornment of the lessee was unnecessary.

The case of *Farley* v. *Thompson*, 15 Mass. 18, was decided on the same principles, which fully support the defence in this case, and would support it without any proof of ouster or agreement to pay the rent to the execution creditors They had obtained the lessor's title to the reversion, and to the rent as incident thereto, before they made a demand on the defendant, and before the rent was due and payable; whereby he would have been bound to pay the rent to them, and not to the lessor, whether he agreed so to do or not. This ground of defence was not taken at the trial, but it would be decisive of the action, if there had been any misdirection at the trial; there was, however, none, for a verdict was directed to be returned for the defendant, and this direction upon the facts reported, and not questioned, was undoubtedly correct. *Exceptions overruled.*

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WASHINGTON FERN *vs.* DANIEL CUSHING & another.

4c 357
167 10

An attachment of the property of a partnership, by the trustee process, is not dissolved by the subsequent several insolvency of one of the partners, after a dissolution of the partnership.

IN this case, which was argued by *J. G. Abbott*, for the plaintiff, and *T. Wentworth*, for the defendants, the material facts sufficiently appear in the opinion of the court.

SHAW, C. J. This was a writ of *scire facias* against Daniel Cushing and Sewall G. Mack, as trustees. It appears by the answers, and the facts agreed, that suits were brought, first by Francis Vose, and second by the plaintiff, Fern, against Whitney and Blair, and the present defendants as their trustees. The actions were continued in court some time, during which the defendants accepted an order, drawn on them by Whitney and Blair, to pay over to a third firm the balance of funds in their hands, subject to prior liens. This fact has no material bearing. The plaintiff's action, though commenced after that of Francis Vose, came to judgment first, and the plaintiffs took out execution, and placed it in the hands of an officer, who duly made demand upon the defendants for the funds in their hands, they having been charged as trustees, and execution awarded, in usual form, against the goods and effects of Whitney and Blair in their hands. Afterwards judgment was rendered in the action of Francis Vose, and execution also awarded against the goods and effects of Whitney and Blair, in the hands of the defendants, Vose's being the first attachment. This execution was placed in the hands of an officer, and a demand made upon the defendants, for the goods and effects of Whitney and Blair in their hands. This occurred on the 24th of March, 1847. On the morning of the same day, the first publication was made of a notice issued by a messenger, upon a proceeding in insolvency, upon the application of Blair alone, after the dissolution of the partnership of Whitney and Blair. It appears that he did not set forth the insolvency of the firm, but only his own; and the warrant and other proceedings

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were conducted upon the principle of his several insolvency. The messenger under this warrant demanded the funds in the hands of the defendants. Afterwards the defendants paid over the whole balance of the funds in their hands, after deducting the amount which they were allowed by the court to retain for their costs and expenses as trustees, on the execution of Vose, as the first attaching creditor.

The ground, on which the plaintiff seeks to charge these defendants as trustees, after they have paid over the entire fund on the execution of the previous attaching creditor, is this: that the plaintiff, by suing out his execution against Whitney and Blair, and causing demand to be made of their effects, in the hands of the defendants, had perfected his lien on the fund, so as to place it beyond the risk of being defeated, and having his attachment dissolved by any proceedings in insolvency; but that Vose, though he recovered judgment and took out execution, did not have a demand made on the trustees on his execution, until after the first publication of the notice of insolvency, and therefore that his attachment was thereby defeated, and let in the plaintiff as the first indefeasible lien on the fund.

This reasoning is plausible, but we think not sound, and not sufficient to give the plaintiff, as second attaching creditor, a priority over Vose, who was the first.

It is not necessary now to decide what act by an attaching creditor is a sufficient taking of the property in the hands of a trustee, so as to prevent a dissolution of the attachment by insolvent proceedings, whether it be the judgment, the issuing of execution, the delivery of such execution to an officer, or the demand by the officer upon the trustee. This decision stands on other grounds.

The insolvent proceedings were against Blair alone. The assignee under these proceedings had no right to take the partnership property, except the share and interest of the insolvent, after the payment and satisfaction of partnership debts. The assignment extended only to the interest of the insolvent partner, in the property and effects of the partnership, after the payment of partnership debts. *Pierce* v. *Jack-*

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son, 6 Mass. 244; *Allen* v. *Wells*, 22 Pick. 450; *Dyer* v. *Clark*, 5 Met. 562; *Parker* v. *Phillips*, 2 Cush. 175.

The insolvent proceedings therefore against Blair did not affect the partnership property attached by Vose in the hands of the trustees, who were indebted to the firm only; and the messenger under these proceedings had no right to the property, and the trustees rightfully paid over the funds in their hands, on Vose's execution, as the prior attaching creditor. Nothing remained to satisfy the execution of the plaintiff.

Judgment for the defendants.

MICHAEL DAVLIN *vs.* CHARLES STONE.

The articles exempted from execution by the Rev. Sts. *c.* 97, § 22, *cl.* 2, as "other household furniture necessary for the debtor and his family, not exceeding $50 in value," are not merely things so absolutely indispensable, that the debtor cannot live without them, but things so essential as to be regarded among the necessaries rather than the luxuries of life. It was held, accordingly, that a sofa and two carpets, of a plain and cheap character, which, together with the other household furniture of the debtor, were of less value than $50, were exempted from execution under this clause.

Trespass is the proper form of action, at common law, for attaching goods exempt by law from attachment; but since the *St.* 1839, *c.* 151, § 4, providing that "in all actions on the case, it shall be no objection to maintaining such actions, that but for this act the form thereof should have been trespass," trover will equally well lie.

THIS was an action of trover for the taking and conversion of two woollen carpets and one sofa, of the alleged value of $30 dollars, and was submitted to the court upon an agreed statement of facts.

The defendant, who was a constable of the city of Lowell, seized the carpets and sofa on an execution against the plaintiff, and sold the same at public auction; and it was admitted that the defendant's proceedings were regular in every respect, and would entitle him to judgment, unless the articles above mentioned, or a part of them, were exempted by law from seizure on execution.

It appeared further, that the plaintiff, who had been a day laborer in a dye-house, and had for a short time also owned

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and kept a small grocery, in Lowell, had gone to Rhode Island to work, previous to the seizure, leaving his wife still keeping house at Lowell; and that at the time of the seizure, he was about removing his wife and three children, together with various articles of household furniture, including the carpets and sofa in question, to Rhode Island, for the purpose of keeping house there.

The carpets consisted of eighteen yards each, and the sofa was not a bed sofa. The whole were sold by the defendant for $23·90. At the time of the seizure, the plaintiff, besides beds and bedding, was the owner of other household furniture, consisting of chairs, tables, crockery, and glass ware, and other necessary articles, the whole value of which did not exceed $25.

D. S. Richardson, for the plaintiff, referred to Rev. Sts. *c.* 97, § 22, *cl.* 2, and the cases of *Gibson* v. *Jenney*, 15 Mass. 205; *Howard* v. *Williams*, 2 Pick. 80; *Richardson* v. *Buswell*, 10 Met. 506. The word "necessary" in the statute means "of reasonable convenience and comfort."

There was no appearance for the defendant.

Shaw, C. J. The only question in the present case is, whether the articles taken by attachment by the defendant on a writ against the plaintiff, were by law exempted from attachment. By the Rev. Sts. *c.* 97, § 22, various classes of articles are exempted, and amongst others, after specifying particular articles, "other household furniture necessary for the debtor and his family, not exceeding fifty dollars in value."

The articles attached by the defendant, and claimed by the plaintiff as exempt, were two carpets and a sofa, which together sold for $23·90, and the agreed value of the other necessary furniture was $25. There is no evidence of the value of the articles sued for, but the sale at auction; that is one species of competent evidence, and as there is nothing to control it, we take it as the value: then it is clear that the household furniture, including these articles, did not exceed $50 in value. As they clearly come within the description of household furniture, the only remaining question is,

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whether they are necessary. This word is not used in its most rigid sense, as something absolutely indispensable, and without which the debtor cannot live, but something so essential, as to be regarded amongst the necessaries of life, as contradistinguished from luxuries. Perhaps chairs would not be strictly necessary, because benches and blocks might do to sit on; but we cannot doubt that cheap and common chairs, and even others originally more costly, acquired by the debtor in more prosperous times, but so reduced by wear and change of fashion, as not to exceed in value, with all his other furniture, $50, would fall under the same designation. We are of opinion, that a plain and cheap sofa and carpet are not necessarily to be regarded as luxuries. These, judging by the sale, must have been eminently of that character, cheap and ordinary. If it were a question, whether a particular article of furniture attached were necessary under particular circumstances, or an article merely of luxury, it might properly go to a jury to ascertain its character and cost, with a view to enable the court to decide whether "necessary" or not. But upon this agreement, it is left to the court upon the facts stated, and we are of opinion that the articles were by law exempted from attachment, and that the action well lies.

We are also of opinion, that trespass is the proper form of action, at common law, for such taking; but now, by force of &. 1839, *c.* 151, § 4, trover will equally well lie.

JOSEPH CLARK *vs.* GRENVILLE PARKER.

4c 361
146 366
4c 361
153 539

The assignor of a chose in action, which has been reassigned to him by his assignee, may bring an action thereon in his own name; although notice of the first assignment was given to the debtor, who promised to pay the debt to the assignee, and no notice was given him of the reassignment; and the debtor may avail himself of the same defence, as if the action were brought in the name of the assignee.

THIS action, which was assumpsit, on an account annexed, having been referred in the court of common pleas to an auditor, he reported thereon, that the items and charges

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in the plaintiff's bill of particulars were proved; that a part thereof were contracted before and the residue after the 8th of June, 1843; that on that day, the plaintiff executed and delivered an assignment of whatever was then due to him from the defendant to one Horsley Shed, in the words following: "In consideration of one hundred dollars, I hereby assign and transfer to Horsley Shed all and whatever sum or sums of money now due and coming to me from Grenville Parker of Lowell, to have and to hold to the said Shed forever, with power to collect the same to his own use;" that the defendant was notified of the assignment, by the assignee, and promised to pay him all that was due from the defendant to the plaintiff, on the said 8th of June, 1843; and that on the 17th of December, 1844, Shed, the assignee, reassigned to the plaintiff all his interest in the moneys due, at the time of the assignment, from the defendant to the plaintiff; but it did not appear, that the defendant had ever been notified of the reassignment previous to the hearing before the auditor.

Upon this state of facts, the auditor was of opinion, and so reported, that by the defendant's assignment to Shed, whatever was due from the defendant to the plaintiff became vested in the assignee, who could maintain an action for the same in his own name, against the defendant; and that no action could be maintained by the plaintiff for the money so assigned, without the assent of Parker, or notice of the reassignment, after it was reassigned. The auditor therefore allowed the plaintiff those items only of his account which accrued after the 8th of June, 1843. But, at the request of the parties, the auditor reported the balance due to the plaintiff, if the amount which accrued before the 8th of June, 1843, ought to have been allowed.

The court of common pleas thereupon gave judgment for the plaintiff for the whole amount, and the defendant excepted.

A. W. Farr, (with whom was *B. F. Butler*,) for the defendant, cited *Crocker* v. *Whitney*, 10 Mass. 316; *Mowry* v. *Todd*, 12 Mass. 281; *Currier* v. *Hodgdon*, 3 N. H. 82; *Usher* v *D'Wolfe*, 13 Mass. 290. *Viggin* v. *Damrell*, 4 N. H. 69

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R. B. Caverly, for the plaintiff, cited Chit. Con. 732, 733; *Dawes* v. *Boylston*, 9 Mass. 337, 346; *Masters* v. *Miller*, 4 T. R. 320, 342; *Hall* v. *Marston*, 17 Mass. 575, 579; *Lang* v. *Fiske*, 2 Fairf. 385.

WILDE, J. This is an action to recover the balance of an account alleged to be due from the defendant to the plaintiff. The case was referred to an auditor, who reported that a part of the plaintiff's charges against the defendant had been assigned to one Shed, and by him reassigned to the plaintiff, before the commencement of this action; but before the reassignment, the defendant had promised to pay the debt assigned to Shed. On these facts the learned auditor was of opinion, that for this part of the plaintiff's claim he was not entitled to recover in the present action, and thereupon reported a small balance in favor of the defendant. But at the request of the parties, he reported the balance due to the plaintiff, if the claims rejected ought, in the opinion of the court, to have been allowed. On this report, judgment in the court of common pleas was rendered for the plaintiff, and to this decision the defendant's counsel objected.

The exception is, that for the debt assigned and reassigned, an action cannot be maintained in the name of the plaintiff, but should have been brought, for his use, in the name of Shed. This exception is founded on a technical objection to the form of the action, but if well founded by the rules of law, the defendant must be allowed the benefit of it.

At common law, choses in action could not be assigned or granted over, for the avoidance of maintenance. In the case of *Masters* v. *Miller*, 4 T. R. 340, Buller, J., remarked, that the good sense of that rule seemed to be very questionable; and in early as well as modern times, it had been so explained away, that it remained at most only an objection to the form of the action in any case. Courts of equity, from the earliest times, he says, thought the doctrine too absurd for them to adopt; and therefore they always acted in direct contradiction to it. And before that case,

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courts of law had departed from the old rule, and had taken notice of assignments of choses in action and of actions upon them; they adhered, however, to the formal objection, and held that the action should be brought in the name of the assignor. And so has been the rule to the present day. Buller, J., however, says: "I see no use or convenience in preserving that shadow when the substance is gone; and that it is merely a shadow is apparent from the later cases, in which the court have taken care that it shall never work injustice." And courts since have acted on that just and equitable principle, which renders it of little importance in whose names, in such cases, the action may be brought.

The question then is, whether this action, as to the claim rejected, should have been brought in the name of Shed; and we are of opinion that it may well be maintained in the name of the plaintiff, and that the defendant may avail himself of the same defence that he could do, if the action had been brought in the name of Shed. It could not have been brought in his name if the defendant had not promised to pay him the debt; thus creating a privity of contract between them. But there was a previous privity of contract between the plaintiff and defendant, which was not affected by the assignment to Shed, although it suspended the plaintiff's right of action until the debt was reassigned to him. And this, we think, takes the case out of the general rule, as to the form of the action, and removes what Buller, J. considered but a mere shadow upon which it was founded. We are not aware of any case where a chose in action has been assigned and reassigned, to which the general rule has been applied; and there appears no good reason why it should be, unless the debtor, in such case, would be precluded from the defence he might set up against the first assignee. Now, it does not appear that the defendant paid any part of the debt to him, or had any set-off to be proved; nor did he make any such claim before the auditor. If he had, it undoubtedly should have been allowed. We are aware, that according to the cases cited from the New Hampshire Reports, a

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set-off in such a case, in that state, would not be allowed. But such is not the law in this state.

In the case of *Sargent* v. *Southgate*, 5 Pick. 312, it was decided in an action by the indorser against the maker of a promissory note overdue, that the defendant might show in his defence a note to him from the payee, upon proving that it was intended as evidence of payment of the note in suit, or he might file the same in set-off, upon proving that it was made to him before he had notice of the assignment. The principle upon which this decision was made was well considered, and is applicable to the present case. This decision renders it immaterial, in all actions founded on the assignment of a chose in action, whether they are brought in the name of the assignor or assignee; yet as the rule has been long established, that in such cases the action is to be brought in the name of the assignor, there is no good reason for changing or qualifying the general rule; for whether the action be brought in the name of the assignor or assignee, the court will take care that the defendant shall not be prejudiced by the form of the action. But without in any respect infringing the general rule, we hold this case not to be within the technical reason on which it was founded, there being a privity of contract between the plaintiff and defendant, and there being no necessity therefore of a new promise by the defendant to the plaintiff after the reassignment to him by Shed. *Exceptions overruled.*

Asa Fitz *vs.* The City of Boston.

In the trial of an action on the case against a city, for an injury occasioned by a defect in a street therein, the presiding judge having instructed the jury, among other things, that what was a defect in a highway, which would render a town or city liable for an injury occasioned thereby, was a "practical question, to be determined by the jury in view of the circumstances of each particular case," added, by way of illustration, "that a different state of repair would be required in a city where a large amount and variety of travel was constantly passing, and in a country place where the state of things in this respect was different." It was held, that, understanding the term "city" to be used to designate a closely-built

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and thickly-settled place, with a great amount and variety of travel, as distinguished from a place of an opposite character, through which there was little travel, the illustration was a proper comment on the law, and not likely to mislead the jury.

This was an action on the case, tried before *Wells*, C. J., in the court of common pleas, to recover damages for an injury alleged to have been received in consequence of a defect in Harrison avenue, one of the public streets of Boston.

It appeared in evidence, that the plaintiff, on the 27th of March, 1847, was riding in a four-wheel carriage in that part of Harrison avenue, between Dover street and Roxbury, when he was thrown upon the ground, in consequence of the main body of the carriage becoming separated from the forward wheels.

Witnesses on the part of the plaintiff testified, that the frost was coming out of the ground; that the street was very muddy; that there had been a rain storm the night previous, which had not entirely ceased when the accident occurred; that there were three or four stones in the road, the largest of which was not so large as a man's head; and that the plaintiff was driving with due care.

Witnesses for the defendants testified, that Harrison avenue from Dover street to Roxbury was made over the salt marsh; that it settled every year; that such a street could not be safely paved for several years after it was first made, on account of its settling; that such streets were always and necessarily very muddy in the spring and fall, and after a rain; and that the street where the accident happened was in a reasonably good condition, as good as it ever was at that season of the year.

The defendants also contended, and introduced evidence to prove, that the stones had not been in the road for the space of twenty-four hours, and that the vehicle in which the plaintiff was riding was unsafe.

The presiding judge instructed the jury, that what was such a defect in a highway as to render a city or town liable for an injury occasioned by it, was a practical question to be determined by the jury, in view of the circumstances of each

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particular case; that corporations obliged to support roads were bound to incur all reasonable expense, and take all reasonable care, to make and keep their roads safe and convenient, but they were not required to do more; that in determining the question whether this duty had been performed, the location of the road, the difficulty of keeping it in a better condition without an unreasonable expense, the season of the year, and the kind and amount of travel having occasion to pass over the road, were all to be considered; and, by way of illustration, the presiding judge stated, that a different state of repair would be required in a city where a large amount and variety of travel was constantly passing, and in a country place where the state of things was different in this respect.

At the conclusion of the charge, the defendants took exception to the illustration stated by the judge, and requested him to instruct the jury, that there was no difference between the obligation of the city and of the country in the respect alluded to, except that the streets in a city must be made wider and more spacious than the wrought part of the roads in the country; but that within the limits of the wrought part, a road in the country was required to be as smooth and level and perfect as the streets of a city.

The presiding judge declined to instruct the jury as requested, but left the case to them upon the instructions before given; and the jury having returned a verdict for the plaintiff, the defendants excepted.

P. W. Chandler, city solicitor, for the defendants.

B. F. Jacobs, for the plaintiff.

Shaw, C. J. Were this a motion to set aside the verdict, as against the weight of evidence, and we were certain that all the evidence was reported, we should think it presented a strong case for the defendants. But no such motion being before the court, and the evidence being stated for another purpose and perhaps partially, we are not at liberty to form an opinion on such grounds.

The question is upon the correctness of the instructions given by the court. [Here the judge recapitulated the evi-

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dence and the instructions to the jury.] The last clause in this charge, the case put by way of illustration, was excepted to by the counsel for the defendants, as stating a different rule of law for different corporations, and in this respect incorrect and tending to mislead the jury. To understand the force of this objection, it is necessary to inquire and ascertain what the purport of the illustration was. The presiding judge stated, that a different state of repair would be required in a city, where a large amount and variety of travel was constantly passing, and in a country place, where the state of things was different in this respect.

We do not understand the court as intending to make any distinction between the duties of cities, towns and districts, as such; but that the term "city" was used as intended to designate a thickly-settled place, with houses and stores contiguous or near to each other, with a great amount and variety of travel, as contradistinguished from places thinly settled, and houses remotely scattered, through which there is little amount and variety of travelling. Thus understood, we think this illustration was a just comment on the law, and not likely to mislead a jury.

It is not that a different rule of duty is prescribed for different corporations; all are bound to keep their highways and town ways in such repair, that the same may be safe and convenient for travellers, with their horses, teams and carriages, at all seasons of the year. But the question is, what is safe and convenient; and this may depend on the quantity and variety of travel.

A street thickly built with shops and houses, crowded at once with heavy and bulky loads, lighter teams and wagons, horse wagons, market carts, and all the variety of light conveyances for the transportation of persons, going necessarily at very different rates of speed, with the ordinary exigencies of frequently crossing, recrossing and stopping for purposes of business, at the various shops and houses, may require not only a wider, but a harder, smoother and more uniform surface to render the road safe and convenient.

The number of heavy teams passing from one part of a

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populous place of business to another, in a few hours, might at times crush and break up a road covered with earth and gravel, which yet would maintain a smooth and unbroken surface, under the little travel, which would pass over it, in a thinly-settled place.

The counsel for the defendants requested the court to instruct the jury, that there was no difference between the city and country in this respect, except that in a city, streets must be made wider and more spacious. This we think could not be laid down, as a legal proposition, general in its application, because circumstances may exist, where something more is necessary in a city street, in the way of hardness, firmness and smoothness, these qualities being no less important than width to safety and convenience.

Indeed, the difficulty arises in laying down any precise proposition, as a rule of law, where the statute has prescribed none. Much must depend upon circumstances, which are ever varying; the ultimate object being, that the highway, in all cases and under all circumstances, must be safe and convenient for travellers, at all seasons; the question what is safe and convenient depending on circumstances.

In coming to the opinion, that the illustration used by the chief justice of the court of common pleas was not such as would be likely to mislead a jury, we take it in connection with the terms of his charge which preceded it, intimating that the question was a practical one, and putting forth the statement excepted to, not as an absolute rule of law, but as an illustration of his more general rule, showing the application of the statute to the different circumstances, to which it must be applied. *Exceptions overruled.*

GEORGE MILLER *vs.* GEORGE F. SLEEPER.

The defendant in an action of replevin, since the Rev. Sts. c 113, § 28, directing that the general issue in replevin shall be joined on the plea of not guilty, and the St. 1836, c. 273, § 1, by which special pleas in bar are prohibited, may, under the general issue of not guilty, prove that the property of the goods alleged to be taken is in himself.

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Miller v. Sleeper.

THIS was an action of replevin to recover the possession of certain goods and chattels described in the writ. At the trial, before *Wells*, C. J., in the court of common pleas, the defendant, having pleaded the general issue of not guilty, which was joined by the plaintiff, but not having filed any specification or statement of his defence, offered evidence to prove that the goods and chattels in question were his property, at the time of the service of the writ. The plaintiff objected to the admissibility of the evidence under the general issue of not guilty; but the presiding judge overruled the objection, and the jury returned a verdict, that the property was in the defendant at the time of the service of the writ, and that he was entitled to a return. The plaintiff thereupon alleged exceptions.

F. W. Bigelow, for the plaintiff, relied on the case of *Holmes* v. *Wood*, 6 Mass. 1.

H. H. Fuller, for the defendant.

METCALF, J. By the common law, replevin lies only for the wrongful taking of chattels, and the general issue is *non cepit*, which admits that the property in the chattels replevied is in the plaintiff, and denies only the taking by the defendant. Of course, property in the defendant cannot be given in evidence, under this issue. It may, however, be pleaded in bar, and if proved under such plea, it is a defence to the action. But by our *St.* 1836, *c.* 273, special pleas in bar are prohibited, and all matters of defence are allowed to be given in evidence under the general issue. And it is directed by the Rev. Sts. *c.* 113, (which authorize replevin to be brought for goods unlawfully detained, as well as for goods unlawfully taken,) that the general issue, in the action of replevin, shall be joined on the plea of not guilty, §§ 27, 28. The defendant, therefore, was rightly permitted, at the trial, to give evidence, under that issue, that he owned the goods which the plaintiff took from him on the writ of replevin.

It was suggested by the plaintiff's counsel, that this evidence, if admissible at all, should have been excluded in this case, because the defendant had not given notice of the matter of his defence, by filing a specification thereof, according

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to the rules of the court of common pleas, where the trial was had. But these exceptions are not so framed as to bring that question before this court. *Exceptions overruled.*

WILLIAM JEFTS & Wife *vs.* SIMEON D. YORK.

4c 371
153 382

4c 371
156 38

4c 371
172 515

An agent, who exceeds his authority, as such, in signing a note which purports to express the promise of his principal, is not personally liable thereon.

THIS was an action of assumpsit, in which the plaintiffs declared on the common counts, and offered in evidence a note, given to the female plaintiff, then unmarried, of which the following is a copy: —

"Lowell, Oct. 14, 1842. $100. For value received, the pastor and deacons of the First Freewill Baptist Church in Lowell, in behalf of said church, promise to pay Betsey Tilton, or her order, the sum of one hundred dollars, to be paid in two years, if called for, by giving one month's notice, with interest annually. S. D. YORK, Agent for the First Freewill Baptist Church in Lowell."

At the trial, before *Bigelow*, J., in the court of common pleas, the defendant contended, that he was the agent of the First Freewill Baptist Church in Lowell, a religious association of individuals not incorporated, or of the pastor and deacons of the said church, and signed and gave the note in suit in his capacity as such agent thereto duly authorized, and was not personally liable thereon; and he introduced evidence to establish this defence.

But the judge instructed the jury, that the defendant's evidence was not sufficient to prove, that he had any authority to give the note in question for the pastor and deacons of the church, or for the church itself; and that having exceeded his authority, he was personally liable on the note in this action.

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

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R. B. Caverly, (with whom was *T. Wentworth*,) for the defendant.

B. F. Butler, for the plaintiff.

Dewey, J. This verdict was returned under the ruling of the court of common pleas, that the defendant had not upon the evidence any authority to execute this note in the name of the pastor and deacons of the First Freewill Baptist Church in Lowell, or in the name of the church itself; and that having exceeded his authority, he was personally liable on the note. The only question before us is as to the correctness of this ruling. As to the right to charge personally, as the promisor of a note, one who executes the same professedly as agent for a third person, but who in fact has no authority to act as such agent, the rule of law has been held differently by different judicial tribunals.

Our reported cases would seem to hold, that the instrument itself could not be enforced, in such case, against the agent who had transcended his authority. Such was the strong suggestion in *Long* v. *Colburn*, 11 Mass. 97, and the same doctrine was more directly adopted and affirmed in the case of *Ballou* v. *Talbot*, 16 Mass. 461. The opposite doctrine has prevailed in New York and also in other states. Giving full effect to our own decisions, we should of course now hold, that in the case supposed, the only legal remedy was an action for falsely representing himself as an agent authorized to execute the contract for the principal, in whose name he professed to act.

In our view, upon the facts here presented, it is unnecessary to consider very particularly the comparative soundness of the one or the other class of decisions referred to, though of course we should give effect to our own adjudicated cases, unless quite satisfied that they were founded upon erroneous principles; but in the present case, it is quite enough to say, that it is impossible, upon any legal ground, to construe the instrument as the individual note of the defendant. Had it been a note of this tenor, "I promise to pay A. B. one hundred dollars. S. D. York, Agent for the Freewill Baptist Society;" it might be plausibly contended, that if the agency

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was unauthorized, all the description of agent, &c., might be rejected, and the note be treated as the individual note of York. But the note is in no sense, and in no manner of reading it, a promissory note of York. In this instance, the body of the note contains the name of the promisor, who alone is the stipulated party to the promise contained in the note.

This action cannot therefore be maintained as upon a promise by the defendant. As to the suggestion, made in the argument, with respect to the right of the plaintiff to recover on the common money counts, for money had and received to the defendant's use, no such question is open under the ruling, upon which the verdict was taken.

Exceptions sustained, and a new trial ordered.

WILLIAM BLAISDELL *vs.* SILAS F. GLADWIN.

A specification of defence, in the court of common pleas, cannot be excepted to for generality after issue joined.

If two persons enter into an agreement in writing, under seal, with a third, that the latter shall sell and convey to one of them a certain lot of land, at a specified price, to be paid for in part by the work of the other, which he binds himself to perform, and in part by the grantee, without any stipulation that the latter shall pay the former for the work so done, the law implies a promise, on his part, to pay a reasonable compensation therefor.

THE plaintiff and defendant, on the one part, and Wood and Hildreth, on the other, entered into an agreement, under seal, of which the following is the substance:—

Wood and Hildreth agreed, on their part, with Gladwin and Blaisdell, that they would sell and convey to Gladwin a certain lot of land in Lowell, described in the agreement, at nine cents a foot, to be paid for, in part, by the labor of Blaisdell in painting and glazing, as should be directed by Wood and Hildreth, at any time within eight months from the date of the agreement, and at certain prices mentioned therein. When Blaisdell should have completed such painting and glazing, the sum to which it amounted,

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at the prices named, was to be deducted from the price of the land, and the balance paid by Gladwin, one third in cash, and the residue one half in one year, and one half in two years, secured by a mortgage on the premises.

Blaisdell, on his part, agreed to do for Wood and Hildreth all such painting and glazing as they should order, in pursuance of the agreement, in a good, faithful, and workmanlike manner, and immediately upon being ordered; and Gladwin agreed, on his part, to take the land at the price named, and to secure so much of the purchase money, as Blaisdell should not pay by painting and glazing, in the manner above mentioned. He also guarantied that Blaisdell should do the painting and glazing, as agreed.

The plaintiff, having performed work and labor, in painting and glazing, for Wood and Hildreth, in pursuance of his agreement, brought this action of assumpsit in the court of common pleas, where the case was tried before *Wells*, C. J., to recover the amount thereof of the defendant.

The defendant, at the term when the action was entered, pleaded the general issue, with a specification of defence, stating that on the trial he should offer to prove, that before the commencement of the action he had paid the plaintiff in full all sums sued for therein; and had also made accord and satisfaction of all the matters in suit between him and the plaintiff. No objection was made to this specification of defence, until after the issue had been joined, and the plaintiff had opened his case and read his writ and declaration to the jury; when the plaintiff objected to its sufficiency, and the judge thereupon ruled that it was insufficient, as not being a compliance with the rule of the court, and that under it the defendant could not offer evidence of payment, or of accord and satisfaction. The defendant did not move for leave to amend his specification.

The only evidence offered by the plaintiff, to show that the defendant agreed to pay the plaintiff for the work sued for, was the contract above stated, and the testimony of a witness who heard a conversation between the plaintiff and defendant, after the work ordered under the contract had been

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commenced, and while the same was going on, but before any of it was completed, when the defendant told the plaintiff that he was poor, and neither would nor could pay the plaintiff for any work which he had done or should do under the contract.

The judge ruled, that, from the contract itself, and from the facts of the case, the jury might find a contract between the defendant and the plaintiff, which would bind the former to pay the latter for the work done by him in pursuance of the written agreement with Wood and Hildreth.

It was also in evidence, that before any of the work sued for was done, the plaintiff and defendant met, and the defendant told the plaintiff, that he would pay him for nothing he had done or should do under the contract, and thereupon the plaintiff told the defendant that he would do no further work on the defendant's account. There was no evidence, that the plaintiff ever at any time notified the defendant that he was doing the work sued for on the defendant's account, or demanded payment therefor, before the commencement of this action.

The judge instructed the jury, that if they should find, that the defendant agreed to pay the plaintiff for the work he should do for Wood and Hildreth, under the contract; that, notwithstanding, before the work was done, the plaintiff told the defendant, that he should do no more work for the defendant, or on his account; yet that if the plaintiff, afterwards, upon being told by Wood and Hildreth, that they would not release him from his contract, did go on and do the work for Wood and Hildreth, under the same; he could recover in this action against the defendant for the work so done, although he never, previous to the commencement of the action, notified the defendant that he was doing the work on his account, or demanded payment therefor.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. G. Abbott, for the defendant.

B. F. Butler and *A. W. Farr*, for the plaintiff.

Shaw, C. J. The first exception in the present case taken

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by the defendant is, that he was prohibited from giving evidence, in defence, to the plaintiff's demand, tending to prove payment, and also evidence tending to prove accord and satisfaction. It appears by the bill of exceptions, that at the time of filing his plea, the defendant had filed a written notice, that he would thus offer evidence of payment, and of accord and satisfaction. No objection was made by the plaintiff to this notice in writing, previously to the trial. It does not distinctly appear what were the grounds, on which the specification of defence was decided to be insufficient; but as it gave notice of an intention to offer evidence of payment and of accord and satisfaction, we must presume that it was held insufficient for generality, and that it did not designate, with sufficient certainty, the instances of payment intended to be relied on, or the nature and kind of accord and satisfaction intended. But if this was the ground of exception to the sufficiency of the specification, we think it should have been taken before joining the issue, and commencing the trial; so that if, in the opinion of the court, it was too general, and did not give the plaintiff the information which it was intended by the rule he should have, the defendant might have amended his specification in that respect. By joining the issue and going to trial, the plaintiff virtually waived this objection. Such a rule seems to be necessary, to prevent surprise, and secure due order and regularity in the conduct of a trial. And in this respect, there seems to be no distinction in principle, between that specification, which a defendant who relies on matter of avoidance must file with his plea of the general issue, in pursuance of a general rule of practice, and the bill of particulars, which a party may file in pursuance of a particular order made on motion. In regard to the latter, it has been recently decided in this court, that the exception of generality must be made to the court, before the commencement of the trial, for the reasons stated. *Robinson* v. *Wadsworth*, 8 Met. 67.

If a paper filed as a specification is intended to be objected to as insufficient, and is not, in the opinion of the court, a

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compliance with the rule, it is much better for all parties, that the court should so decide, and cause it to be stricken out, than to permit the defendant to go on without any objection, until he is surprised at the trial by the rejection of his evidence.

In deciding upon the degree of particularity, as to time, place and circumstances, the court will take into consideration the subject, and the degree of certainty which the defendant may be presumed to have, or be able to obtain. They will take care not to introduce the niceties of special pleading, and thereby expose parties to technical objections of variance and the like, without securing the benefits of that admirable system. All that can be required is, that such true and substantial notices shall be given as will narrow the subjects of inquiry to the actual matters in dispute.

Being of opinion that the defendant's evidence was not rightfully rejected, the judgment of the court is that the verdict must be set aside, and a new trial ordered.

On the other point, it appears to us, that upon proof of an order from Wood and Hildreth to the plaintiff, he was bound by his agreement to do the work; and the agreement shows that it was to be done for the benefit of the defendant, in part payment for land stipulated to be conveyed solely to his use. The agreement does not contain any direct stipulation of the defendant to pay the plaintiff for the work; but we think it establishes a relation between these parties, from which the law implies a promise to pay a reasonable compensation for the work to be done. It seems analogous to an instrument under seal, given to A. by B., as principal, and C. and D. as sureties. There is no express stipulation by the principal with the sureties, that if they have to pay, he will reimburse them. But the law implies such a promise, from the relation created by the bond. And in such case, the surety may have an action against the principal for money paid, at his request, and for his use; the legal liability, created with the consent of the principal, is equivalent to a request, and the law thereupon raises the promise. When one has paid the debt of another, or received payment of the

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debt due in whole or in part to another, in something other than cash, it is deemed, as between the parties, to be a payment of money. *Floyd* v. *Day*, 3 Mass. 403; *Randall* v *Rich*, 11 Mass. 494.

But it is not necessary to go to that extent in the present case. The agreement to which the defendant was a party, carries a clear implication, that the labor was to be done, on the procurement and retainer of the defendant, to enure to his benefit, as cash, on his contract for land, and the law implies a promise to pay the plaintiff for it. The legal obligation, under which the plaintiff placed himself by his promise to Wood and Hildreth, made with the consent of Gladwin, and for his account, precluded the latter from revoking his request, and rescinding his implied promise to pay the plaintiff for his labor.

Whether the prices for painting work, stipulated for in the contract, are conclusive as between these parties, or whether the plaintiff can recover as upon a *quantum meruit*, we give no opinion.

Daniel Chapman *vs.* The City of Lowell.

Where an individual made a contract in writing to build two drains for a city, in a thorough, skilful, and workmanlike manner, satisfactory to the committee of the board of aldermen having the same in charge; to execute the work under the general direction and superintendence of the committee; and to cause the work to be carried forward and finished with as much rapidity as could reasonably and beneficially be done: It was held, that such general direction and superintendence were not limited to the quality of the materials, and the manner of doing the work, but also extended to the time of doing the same; as to which, the committee, acting with an honest and just regard to the interests of the city, and not arbitrarily, capriciously and unreasonably towards the other party, were exclusively authorized to judge.

This was an action of assumpsit, in which the plaintiff declared specially for the breach of a written contract with the defendants, entered into on their part by a duly authorized committee, on the 4th of August, 1845, for the construction of two common sewers or drains in Lowell.

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The plaintiff undertook, among other things, to cause the whole to be finished, both as to work and materials, in a thorough, skilful and workmanlike manner, satisfactory to the committee of the board of aldermen having charge of the same, and to execute the work under the general direction and superintendence of the committee, and to cause the same to be carried forward and finished with as much rapidity as could reasonably and beneficially be done.

At the trial, which was before *Wells*, C. J., in the court of common pleas, the plaintiff offered to prove, that after constructing one of the drains, and having made his preparations for building the other, about the middle of October, 1845, the defendants' committee notified the plaintiff to stop work, and refused to permit him to go on; and that he could, reasonably and beneficially for both parties, have gone on with the work and completed it in the fall of 1845. The plaintiff did not offer to prove, that there was any gross negligence or bad faith, on the part of the committee, but only that they had made a mistake, and misjudged as to whether the work could then be reasonably and beneficially carried forward and completed. It was admitted, that the work was completed by the plaintiff, under the direction of the committee, and in pursuance of the contract, in the spring of 1846, subsequent to the commencement of this action, and that he had since been paid therefor according to the contract. The plaintiff also offered to prove, that he had been greatly injured by the stopping of the work, as above mentioned.

This action was brought to recover the damages thus sustained by the plaintiff.

The presiding judge ruled, that the facts stated, if proved, would not be sufficient to entitle the plaintiff to maintain this action; whereupon a verdict was returned for the defendants, and the plaintiff alleged exceptions.

J. G. Abbott, for the plaintiff, referred to *Wise* v. *Chaney*, 1 Gilm. 562; and *Mill Dam Foundery* v. *Hovey*, 21 Pick. 417, 448–451.

S. Ames, city solicitor, for the defendants.

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SHAW, C. J. This is assumpsit on a written contract not under seal, by which the plaintiff contracted to build two drains, therein described. The *gravamen* of the plaintiff's complaint is, that having completed one of the drains, he was prohibited by the committee of the city from proceeding to complete the other, in violation of their contract. From the declaration, it would appear, that he was prohibited altogether from doing the work and earning the pay for it; whereas it appears by the bill of exceptions, that he did complete it the next spring, and did receive his pay for it, and the true ground of complaint is, that he was delayed by the committee from proceeding the first season, and thereby sustained damage.

By the bill of exceptions it appears, that the plaintiff offered to show, that having completed one of the drains, about the middle of October, he was about proceeding to lay the other, and had procured materials, when the city notified him to stop work, and refused to permit him to go on. He also offered to prove, that he could, reasonably, and beneficially for both parties, have gone on and completed the work that fall; but he did not offer to prove gross negligence or bad faith, on the part of the committee, but only that they had made a mistake and misjudged, as to the point whether the work could reasonably and beneficially be carried forward and completed.

The court of common pleas were of opinion, that these facts, if proved, would furnish no ground of action. The court here are of opinion that this direction was right. This work was to be done in the streets, the use of which must be more or less interrupted by it; and it was highly reasonable that the city, as a contracting party, should retain some control over it, and they did so, by the terms of their contract. It was stipulated by the plaintiff, that he was to execute the work, under the general direction and superintendence of the committee, and cause the same to be carried forward and finished, with as much rapidity as reasonably and beneficially it could be done.

This general superintendence, we think, was not limited

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to the quality of materials, and the manner of doing the work, because it is elsewhere in the contract and specially stipulated, that the plaintiff would cause the whole to be finished in a thorough, skilful and workmanlike manner, satisfactory to the committee. By reserving to the committee a general direction and superintendence, the plaintiff agreed to conform to the reasonable directions of the committee, as to the time of doing the work, of which they were to judge, acting with an honest and just regard to the interests of the city. Under this stipulation they were not to act arbitrarily, capriciously and unreasonably; but exercising an honest and reasonable judgment, the plaintiff by his contract bound himself to conform to it, and the city are chargeable with no breach of contract. *Exceptions overruled.*

ALFORD FISHER *vs.* SHERMAN BARRETT & others.

4c 381
158 291

The lessor for years of part of a steam mill having covenanted with the lessee, to furnish him with a certain amount of steam power during every working day in the year, and that if at any time he should fail to do so, the rent should cease during the time of such failure; it was held, that the suspension of the rent was not a liquidation of the lessee's damages for a breach of the lessor's covenant to furnish steam power.

THE facts of this case sufficiently appear in the opinion of the court.

S. Ames, for the plaintiff.

E. R. Hoar, for the defendants.

METCALF, J. This is an action of covenant broken, which has been tried in the court of common pleas, and comes before us upon exceptions to the ruling of that court. The action is upon an indenture, made on the 25th of August, 1847, by Abel Moore, Joel Britton and Sherman Barrett, all of Concord in this county, of the one part, and the plaintiff, of the other part; and is in the following terms: "The said Moore, Britton and Barrett do hereby demise, lease and let unto the said Fisher, a certain part of the steam mill, so

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called, situated in said Concord, and belonging to the Concord Steam Mill Company, to wit, the whole of the floor of the second story of said steam mill, except the part used for sawing logs," &c., "with certain other rights and privileges, as hereinafter set forth; to hold for the term of five years. The said lessors agree to cause to be erected, in addition to the north end of said room," certain fixtures, &c., not in question in this suit. "Also said lessors agree to put up in said room such shafting as may be necessary and appropriate for said Fisher's business. Also said lessors agree to furnish sufficient steam power, during every working day in the year, to run such machinery as said Fisher shall have in the building for his use; provided that the power to be used by said Fisher shall not exceed an average of six horse power, in any one year, and at no time to exceed twelve horse power; and if at any time such power is not furnished, the rent, during the time such power is not furnished, shall cease; unavoidable accidents excepted. They also agree to furnish a main belt for the shafting. Also a planing machine is to be put in, on or before the twenty-fifth day of February next. And the said Fisher does promise and agree to hold the said premises for the term of five years from the said twenty-fifth day of August instant, and to pay therefor, as rent, the sum of two hundred and twenty-five dollars per year, until the machinery for planing boards shall be put in, on or before the twenty-fifth day of February next, and two hundred and seventy-five dollars a year, after said machinery for planing boards shall be put in operation as above mentioned, and to pay said rent quarterly. And said lessee agrees that the power, which he shall use, shall not average more than a six horse power in any one year, nor shall, at any one time, exceed a twelve horse power. The said rent to commence when the said shafting is put up and set in operation."

The plaintiff's declaration alleges that he entered into the demised premises, and fulfilled his covenants with the defendants; that he desires still to enjoy the benefits of said demise, and to carry on his ordinary business in said prem-

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ises, by the aid of machinery there set up by him; but that the defendants have not furnished a planing machine, as they covenanted to do; and that they, on the 21st day of January, 1848, and ever after, until the commencement of this action, (March 6th, 1848,) neglected and refused to furnish to him any steam power to run such machinery as he had in said mill, for his use.

At the trial, the plaintiff claimed damages only for the defendants' refusal to furnish the steam power which they, by their covenant, had agreed to furnish to him. The defendants admitted that they had so refused. But they contended, that, by the terms of the lease, the suspension of the rent was intended to be the liquidated damages for the breach of the said covenant, and that they were not liable for any other or further damages. It appeared in evidence that the plaintiff had paid no rent, during the time the steam power was withheld from him; and the plaintiff offered to prove that the actual damage, which he had sustained by the withholding of the steam power, greatly exceeded the amount of the rent during the time it was withheld. The court ruled that the plaintiff was not entitled to recover, in this action, for the breach of said covenant; and a verdict was thereupon rendered for the defendants.

The sole ground upon which the defendants' counsel has relied in argument, to support this ruling, is that which was taken at the trial, namely, that the parties had agreed upon the suspension of rent as stipulated damages for the withholding of the steam power. This ground, in our opinion, cannot be maintained. It is said, in 2 Comyn on Contracts, (1st ed.) 537, that "stipulated damages can only be where there is a clear and unequivocal agreement, which stipulates for the payment of a certain sum as a liquidated satisfaction, fixed and agreed upon by the parties, for the doing or not doing of certain acts particularly expressed in the agreement." If this be an accurate description of stipulated damages, it effectually disposes of the present case.

The only authority, on which the defendants' counsel placed any reliance, was the case of *White* v. *Dingley*, 4 Mass.

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433, where the defendant gave the plaintiff a letter of license for two years, and covenanted not to sue him within that time, and also covenanted that if he should so sue, the plaintiff should be wholly discharged from the defendant's claim. The defendant did sue the plaintiff within two years, and committed him to prison, on the writ; and the plaintiff brought an action, on the defendant's covenant, to recover damages for the breach thereof. It was held that the action could not be maintained; and it was said that the forfeiture of the debt was not in the nature of a penalty, but was a liquidation of the damages to be paid in case of a breach of the covenant on the part of the defendant. But the true ground of that decision, we believe, was stated in the close of the opinion of the court; viz., that "no action, by the common law, lies for damages sustained by suing a civil action, when the plaintiff fails, unless it be alleged and shown to be malicious and without probable cause."

In the present case, the plaintiff took a lease of part of a building, for five years, for the purpose of carrying on business, and placed machinery therein, on the faith of the defendants' covenant to furnish him with steam power to work it. He began to work, and the defendants soon withheld all steam power, and wholly defeated the business on which he had entered. And in answer to his claim of damages for this breach of their covenant, they say that those damages are liquidated by the agreement between them and him, that they shall not claim rent for what they prevent him from enjoying. We cannot so construe the indenture.

New trial granted.

HENRY L. JAQUES & others *vs.* JAMES GOULD & another.

Where the rent in a lease for years is reserved generally, without being made payable to any particular person, and is covenanted to be paid quarterly during the term, the lease does not terminate on the death of the lessor; but the rent is payable afterwards to his heirs at law, if he dies intestate, who may maintain an action of debt on the lease to recover the same.

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Jaques & others v. Gould & another.

If a lease for years, which terminates by the death of the lessor, contains a covenant, on the part of the lessee, to pay the rent reserved, and for such further time as he may hold the premises, and he holds over after the death of the lessor, he will be liable to pay the rent subsequently accruing, in the same manner as if the lease did not terminate on the lessor's death.

When a lessee for years covenants to deliver up the premises, at the end of the term, to the lessor, in as good order and condition as the same then are or may be put into by the lessor; whatever repairs are necessary to keep the premises in such condition and order, must be made by the lessee.

It appeared by an agreed statement of facts upon which this case was submitted to the court, that on the 23d of August, 1845, Henry Jaques, by an instrument in writing, purporting to be an indenture, signed by the parties thereto, but not sealed, demised and let to James Gould and John W. Mulliken, a certain wharf estate in Charlestown, known as Devens's wharf, with the stores and buildings thereon, dock rights, railroad tracks, and all privileges to the same belonging.

The lease contained the following clause:—

"To hold for the term of three years from the 1st of December, A. D. 1845, yielding and paying therefor the rent of three thousand dollars per annum. And the said lessees do promise to pay the said rent in quarter yearly payments of seven hundred and fifty dollars on the first day of March, June, September and December, in each year, the first payment to be made on or before the first day of March, A. D. 1846; and to quit and deliver up the premises to the lessor, or his attorney, peaceably and quietly, at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are, or may be put into by the said lessor; and to pay the rent as above stated, and for such further time, as the lessees may hold the same, and not to make or suffer any waste thereof; nor make, or suffer to be made, any alterations therein, but with the approbation of the lessor thereto in writing having been first obtained; and that the lessor may enter to view, and make improvements, and to expel the lessees if they shall fail to pay the rent as aforesaid, or make and suffer any strip or waste thereof."

The lessor, Henry Jaques, on the 19th of July, 1846, died

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intestate, seized of the premises leased, leaving the plaintiffs his heirs at law; by whom this action, which was debt, was brought on the instrument above stated, for two quarters' rent from March 1st to September 1st, 1847, deducting therefrom the sum of $500 which had been previously paid on account of the same.

It was agreed, that if upon these facts the court should be of opinion that the plaintiffs were not entitled to recover, a nonsuit should be entered; otherwise judgment was to be entered for the plaintiffs, for the balance of the rent sued for with interest; unless it was competent for the defendants, in reduction of the rent claimed, to introduce evidence of any of the following facts, namely: That the wharf was decayed and weak, and consequently insufficient for the support of such articles as are usually landed on wharves; that articles placed thereon have broken through, subjecting the defendants to the payment of damages; that the wharf and buildings thereon became out of repair, so as to require substantial, lasting and general repairs, which the plaintiffs had due notice of, and were requested to make, but neglected so to do, to the great damage of the defendants; and that the dock was in part unfit for use, in consequence of a large rock, on which vessels were in danger of striking, and on which one vessel did strike, whereby the defendants were subjected to the payment of damages. If these facts, or any of them, were admissible in evidence, the case was to be submitted to a jury.

G. W. Warren, for the plaintiffs.

J. A. Andrew, for the defendants.

Wilde, J. This is an action of debt for rent reserved on a lease of real estate for the term of three years. Before the expiration of the term the lessor died, and this action is brought by his heirs against the lessees. The question to be decided is, whether the lease terminated on the death of the lessor, or still continued, the rent passing thereupon to his heirs.

The clause in the lease on which the question depends is as follows: "To hold the same [premises] for the term of three years from the first day of December, 1845, yielding and

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paying therefor the rent of $3000 per annum. And the said lessees do promise to pay the said rent in quarter yearly payments of $750, on the first day of March, June, September and December in each year; the first payment to be made on or before the first day of March, 1846, and to quit and deliver up the premises to the lessor or his attorney, peaceably and quietly at the end of the term."

The counsel for the plaintiffs contend, that this clause in the lease is to be construed according to the rule of construction laid down by lord Coke, (Co. Lit. 47): "If the lessor," it is said, "reserve the rent to himself, it shall determine by his death, if he die within the term; but if he reserves the rent generally, without showing to whom it shall go, it shall go to his heirs." The same rule of construction is laid down in Plow. 171, where it is said, "If rent be reserved generally, without saying to whom, the law will make the distribution." So in *Whitlock's Case*, 8 Co. 69, 71, it was agreed, that the most clear and sure way to secure rent was, to reserve rent during the term, and leave the law to make the distribution. And this distinction, as to the reservation of rent, is admitted in many other cases. *Sacheverell* v. *Froggatt*, 2 Saund. 367; *Cother* v. *Merrick*, Hard. 89; *Sury* v. *Brown*, Latch, 99, 101.

This rule of construction is decisive in the present case. The rent, by the terms of the lease, is reserved generally, and is not made payable to any particular person; and it is expressly agreed to be paid quarter yearly during the whole term of three years, which clearly shows that it was not the intention of the parties, that the lease should terminate on the death of the lessor; and so it appears also from the facts agreed; for the lessees continued to occupy the demised premises after the death of the lessor, and have paid a part of the rent which accrued after that time. Nor does the lessee's agreement to deliver up the premises to the lessor or his attorney, peaceably and quietly, at the end of the term, indicate any different intention; the end of the term in that clause of the agreement must have been understood to refer to the end of the three years; otherwise it would be incon-

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sistent with the other part of the agreement immediately preceding it.

There is another ground upon which the plaintiffs would be entitled to the rent in arrear, although the term did terminate on the death of the lessor. By a subsequent clause in the lease, the defendants agreed to pay the rent as above stated, and for such further time as they might hold the same. If, then, the defendants continued to hold over after the death of the lessor, as must be inferred from the facts agreed, although it is not expressly so stated, it is immaterial whether the term terminated at the end of three years, or on the death of the lessor.

Another question is raised by the statement of facts, namely, whether the plaintiffs were bound by the lease to make any repairs during the term. But as this question has not been argued by counsel, we presume it was intended to be waived; if not, however, we are of opinion, that by the terms of the lease, the lessees were bound to make all repairs during the term; for they expressly agreed to deliver up the premises at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties, excepted, as the same then were or might be put into by the lessor. Whatever repairs, therefore, might be necessary to keep the premises in as good repair and condition as they were in when the defendants took possession, except as above excepted, they, and not the lessor, or the plaintiffs, were bound to make.

Judgment for the plaintiffs.

ROYAL CALL *vs.* SOLOMON C. CALEF.

The owner of a patent right, having given the plaintiff a power of attorney to prosecute for an infringement thereof, with a right to retain one half of what he might so obtain for his services and expenses, subsequently sold the patent, together with the claim for infringement, to the defendant, with authority to revoke the plaintiff's power, upon paying him for his services; and the defendant thereupon

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gave the plaintiff notice of his wish to revoke the power, and requested him to stop all further proceedings, and promised to pay him twenty-five dollars for his services, to which the plaintiff assented and forbore all further proceedings; it was held, that the plaintiff's forbearance was a good consideration for the defendant's promise, and that the same was not a promise to pay the debt of another within the statute of frauds.

THIS was an action of assumpsit, in which the plaintiff declared on the common money counts, and filed a bill of particulars, as follows: —

"April, 1845. For services rendered by me for Henry Leeds & Co., about the patent right of a planing machine, for which you promised to pay me and became liable therefor. $25.

For money received by you of Charles Hutchinson for me and to my use. $25."

The plaintiff claimed to recover the sum of $25 and interest from the date of the writ.

The facts of the case, which were agreed by the parties, will be found sufficiently stated in the opinion of the court.

T. Hopkinson, for the plaintiff.

I. S. Morse, for the defendant.

SHAW, C. J. The evidence in the present case tended to prove an express promise by the defendant to pay the plaintiff the sum of $25. Two objections are made to the right of the plaintiff to recover: 1. Want of consideration; and, 2. That the promise was to pay the debt of another, and consequently not available unless made in writing.

The facts are somewhat complicated; but, when understood, we think the case is clear. One Leeds and the plaintiff had an interest in a patent right, which they supposed had been violated by Baldwin and Stevens. Leeds gave the plaintiff a power of attorney to proceed against Baldwin and Stevens, either by suit or negotiation, to recover damages for such violation and to prevent it in future, with an agreement, that the plaintiff should have one half he should obtain, by suit or negotiation, for his services and expenses. The right was supposed to be in Leeds. Subsequently, Leeds entered into an executory agreement with Calef, the defendant, and one Heath, since deceased, to transfer his patent right to

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them, including his claims on Baldwin and Stevens; and authorized them to revoke the power which he had given to the plaintiff, they, Calef and Heath, paying the plaintiff for his services.

It might well be contended, for the plaintiff, that after he had done labor and incurred expenses under the power, it was no longer revocable by Leeds; it was a power to collect money, in part to his own use, and was therefore a power coupled with an interest, which, according to the general rule, is irrevocable. But whether so or not, Leeds did not revoke, nor authorize the defendant, Calef, to revoke it, except upon the condition of paying the plaintiff. Under these circumstances, the defendant gave notice to Call, the plaintiff, to stop further proceedings, and of his desire to revoke his power, with a view of settling with Baldwin and Stevens himself; and at the same time promised to pay the plaintiff $25, for his services, to which the plaintiff assented, and forbore all further proceedings against Baldwin and Stevens. This forbearance, and relinquishment of a claim, against a third party, at the defendant's instance, was a good consideration for his express promise.

And this view, we think, furnishes an answer to the other objection. This was not a promise to pay the debt of another. Leeds owed the plaintiff nothing. The plaintiff acted, it is true, as Leeds's agent, and under his power; but he did so upon a special agreement to have half what he should recover for his compensation; so that such service created no debt, by way of *quantum meruit*, or otherwise, as due to him from Leeds. The defendant's promise was a new and original promise, on a consideration moving from the plaintiff, and conferring a benefit on the defendant, by enabling him to settle with Baldwin and Stevens, on his own terms, as he was desirous of doing.*

Judgment for the plaintiff.

* This is the same case reported in 13 Met. 362, where the defence was that the agreement was void on the ground of maintenance and champerty.

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JOSEPH GERRISH *vs.* JOSEPH B. CUMMINGS & another.

In an action of trover against two, one of whom is defaulted, and the other found guilty by the jury, there is but one assessment of damages, and a joint judgment.

Where one of two defendants, in an action of trover, is defaulted, he is incompetent as a witness on the trial for the other, on the ground of interest, even though called to testify to matters not connected with the question of damages.

A witness, who is admissible at all, is liable to be examined upon all matters pertinent to the issue on trial; and one, who is incompetent by reason of interest in the event of the suit, cannot be made competent by being called to testify only to a fact in which he is not interested, and not to the question of damages.

THIS was an action of trover, tried before *Wells*, C. J., in the court of common pleas. The plaintiff, at the trial, introduced evidence tending to prove that Cummings, one of the defendants, hired a horse of him to go to Templeton, telling him that Bonney, the other defendant, was going with him; that Bonney rode with Cummings; that it was a joint hiring in which Bonney was interested; and that the horse was driven a greater distance than he was hired for.

Cummings having been defaulted at a previous term, the other defendant, Bonney, defended, denying that he was connected with the hiring, and contending that there was no joint hiring or conversion; and he offered Cummings as a witness, generally, but the presiding judge rejected him as incompetent. He then offered Cummings as a witness upon the question of joint hiring alone, without reference to the question of damages, but the witness was again rejected. The defendants then moved severally for a separate assessment of damages, but the motion was overruled, and the jury returned a verdict for the plaintiff, and assessed damages against both defendants, who thereupon alleged exceptions.

A. P. Bonney, for the defendants.

B. F. Butler, for the plaintiff.

SHAW, C. J. In an action of trover, after one defendant was defaulted, the other pleaded; and on a trial of the issue, Bonney, who pleaded, called Cummings, who was defaulted as a witness, first generally, next as a witness upon the question of joint hiring, and not on the question of damages

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but he was rejected. The court are of opinion, that he was not a competent witness, on the ground of interest, and was rightly rejected.

In an action of trover, there can be but one assessment of damages. Though one defendant is defaulted and the other found guilty, yet there must be a joint judgment. The verdict, which is to fix the amount of damages, fixes it as well for the party defaulted, as for the party who pleaded. The defaulted defendant, therefore, has a direct interest in favor of his co-defendant, the party who called him, to reduce the damages. *Thorpe* v. *Barber*, 5 M. G. & S. 675.

In a subsequent case, *Haddrick* v. *Heslop*, 12 Ad. & El. N. S. 267, in trespass, a defaulted defendant was admitted as a competent witness; but he was called by the plaintiff, and of course to testify against his interest. But the authority of *Thorpe* v. *Barber* was recognized and affirmed.

We think a similar rule was adopted on similar grounds, by this court, in the case of *Vinal* v. *Burrill*, 18 Pick. 29, which is distinguishable, we think, from the case of *Bradlee* v. *Neal*, 16 Pick. 501; because that was upon contract, where there would be contribution amongst defendants, in case of a joint judgment; where the rights of the defendants themselves would not be determined by the judgment, in the case on trial; and where, therefore, the witness, had no direct interest in the event of the suit.

It appears to us very clear, that the competency of the witness could not depend upon the consideration, that he was specially called to testify to a fact, in which he was not interested, and not to the question of damages. If admissible at all, we think he would be liable to be examined upon all matters pertinent to the issue. His competency depends upon his interest in the event of the suit, and not in the particular question to which the party calling him chooses to examine him. A different notion has sometimes been suggested, but we think there is no ground for it.

Judgment on the verdict for the plaintiff.

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ABRAHAM EDWARDS *vs.* THOMAS SUMNER.

4c 393
176 162

An attachment of personal property, which is sold on the writ, pursuant to the provisions of the Rev. Sts. *c.* 90, §§ 57, 61, is dissolved by the insolvency of the debtor, in the same manner as if the property remained unsold, whether the creditor or the officer have knowledge of the insolvency or not; provided the first publication of notice of the insolvency takes place before the proceeds of the sale are seized on the execution; and if the officer, without notice of the debtor's insolvency, pay over such proceeds to the judgment creditor, after the first publication of notice of the insolvency, he may recover back the same of the creditor.

THIS was an action of assumpsit for money had and received, tried before *Fletcher*, J.

The defendant, who is a deputy sheriff, on or about the 10th of December, 1845, attached certain horses and other chattels, as the property of one John Friend, on a writ against him in favor of James Ricker, and sold the property on the writ, pursuant to the Rev. Sts. *c.* 90, § 61. The net proceeds of the sale, as appeared by the return, amounted to $559·60. The action was entered at the next March term of the court of common pleas, to which the writ was returnable, and was continued to the following December term, when the defendant therein was defaulted. Judgment was thereupon rendered against him, on the 4th of January, 1847, in favor of the plaintiff Ricker, for the sum of $544·98; upon which judgment an execution was sued out on the 13th of the same January, and committed to the defendant for service; who, on the next day, levied the same on the proceeds of the property attached, and on the 23d of the same month, paid the amount of the execution to the attorney of the judgment creditor, leaving a balance in his hands of $4·47.

On the 5th of January, 1847, John Friend, the judgment debtor, applied by petition for the benefit of the insolvent law; on the 6th, a warrant was accordingly issued to a messenger; and on the 7th, the first publication of notice of the insolvency took place. The first meeting of creditors was held on the 1st of February following, at which the plaintiff Edwards, was chosen assignee and accepted the trust.

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The plaintiff demanded of the defendant the net proceeds of the sale of the property attached, some time in the spring of the year 1847; and, afterwards, before the commencement of the action, the defendant tendered to the plaintiff the balance above mentioned of $4·47, which the plaintiff refused to receive.

There was no evidence, that the defendant, at any time before paying over the proceeds of the sale to the judgment creditor, had any notice or knowledge, actual or constructive, of the proceedings in insolvency, except as above stated.

Upon these facts, the defendant contended that the action could not be maintained, but the judge ruled otherwise, and instructed the jury, that the plaintiff was entitled to a verdict, which was rendered accordingly for the whole sum demanded. To these instructions the defendant excepted.

B. R. Curtis and *G. W. Warren*, for the defendant, argued, that although the publication of notice would affect the creditor, it would not affect the officer, no actual notice being shown. And they referred to Story, Bailm. §§ 125–135, 207, 208, 620; *Badlam* v. *Tucker*, 1 Pick. 389, 395; Story, Ag. §§ 265, 470; 2 Liverm. Ag. 307, 308, 310; *Salte* v. *Field*, 5 T. R. 211; —— v. *Harrison*, 12 Mod. 346; *Hazard* v. *Treadwell*, 1 Stra. 506; *Morgan* v. *Stell*, 5 Bin. 305, 316; *Sadler* v. *Evans*, 4 Bur. 1984; *Greenway* v. *Hurd*, 4 T. R. 553; *Bacon* v. *Leonard*, 4 Pick. 277; *Tope* v. *Hockin*, 7 B. & C. 101; S. C. 9 D. & R. 881; Chit. Con. 611; *Coppendale* v. *Bridgen*, 2 Bur. 814, 818; *Allanson* v. *Atkinson*, 1 M. & S. 583; *St.* 6 Geo. IV. *c.* 83; *Sowerby* v. *Brooks*, 4 B. & Ald. 523.

A. H. Nelson, for the plaintiff.

Metcalf, J. By the Rev. Sts. *c.* 90, §§ 57, 61, the proceeds of personal property which is attached, and is sold before judgment is recovered against the owner, "shall be held by the officer, subject to the attachment or attachments, and shall be disposed of in like manner as the said property would have been held and disposed of, if it had remained unsold." Now, if the goods, which the defendant attached, had remained unsold, and had not been seized in execution

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before the first publication of notice, they must have been given up to the plaintiff; because the attachment would have been dissolved by the assignment of Friend's estate to him. And for the like reason, the money, which the defendant received on the sale of the goods, must be given up, "in like manner," unless the defendant is excused by want of actual notice of the proceedings in insolvency, before he paid over the money to the attaching creditor. *Wheelock* v. *Hastings*, 4 Met. 504. And we are of opinion that he is not so excused. By the insolvent law, (*St.* 1838, *c.* 163, § 5,) the assignment vests in the assignee all the debtor's property, which he could, by any way or means, have lawfully sold, assigned or conveyed, or which might have been taken in execution on any judgment against him, at the time of the first publication of the notice of issuing the warrant to the messenger, although the same may then be attached as the property of the debtor; and such assignment is effectual to pass all said property, and dissolve any such attachment, and to vest in the assignee all debts due to the debtor, or to any person for his use, and all his rights of action for any goods or estate. By the assignment in this case, therefore, the attachment of Friend's property was dissolved, and the right to the money in the defendant's hands was vested in the plaintiff, from the 7th of January, 1847, when the first publication of notice was made. And the defendant did not receive the execution, on which he applied the money, in discharge of the attaching creditor's judgment, till six days afterwards.

It is by the legal operation of the assignment, and not by actual notice to creditors or officers, that the debtor's property is vested in the assignee, and that attachments thereof are dissolved. Publication of notice is the decisive fact in this matter, and is notice, actual or constructive, by which all parties are bound. Even actual notice, before publication, will not affect an attaching creditor's rights. *Clarke* v. *Minot*, 4 Met. 346. In that case, the chief justice said, "We are now seeking to ascertain and fix the point of time intended by the statute as the time at which all the property of the

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debtor is changed, and his power over it suspended; that point, in other words, prior to which all payments, made by him or to him, all conveyances (not fraudulent) made by him, all seizures, levies and extents of execution upon his property, shall be held valid, and all those made after void. The time of publication was fixed, obviously, because that act would, in most cases, afford actual notice to those immediately interested; and it was intended as constructive notice to all."

Suppose that Friend had died insolvent on the day before he petitioned for the benefit of the insolvent law. The attachment would have been dissolved, provided administration had been taken on his estate, within a year; and the money in the defendant's hands would have been payable to the administrator, for the benefit of all the creditors. Rev. Sts. *c.* 90, § 105. Could it be pretended that the defendant, in such case, if he had paid over the money to the attaching creditor, could resist the claim of the administrator, on the mere ground of want of notice of Friend's death?

There is no more hardship in the present case than in any other in which an officer, for want of notice, takes the property of one person, on a writ or execution against another. He may, in all cases, take an indemnity beforehand; and in this case he is entitled to recover back the money from the creditor to whom he paid it. *Judgment on the verdict.*

PETER CLARK *vs.* BENJAMIN BURT.

4c 396
175 361

4c 396
175 361

The boundary line, between adjoining proprietors of land, may be ascertained and fixed, by the award of arbitrators appointed for the purpose.

An award, establishing a boundary line, from one known monument to another, *by land of one of the parties*, is void for uncertainty, as to the line so described.

The terms of an award in writing cannot be controlled by the oral declarations of the arbitrators, though made to the parties at the time of its publication.

The admissions of one of the parties to an award, as to the meaning and intention of the arbitrators, are inadmissible in evidence to control its terms.

THIS was an action of trespass to land, tried before *Wells* C. J., in the court of common pleas.

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Neither of the parties exhibited any title by deed to the close in dispute; but it was in evidence, on the part of the plaintiff, that previous to the 19th of November, 1845, he and those under whom he claimed had been thirty years in possession of the place in question, which was a part of a larger lot, and covered with wood. The defendant offered no evidence to show possession in himself, or in those under whom he claimed, previous to the said 19th of November.

The plaintiff and defendant being the owners of land adjoining each other, and adjoining the close in question; and disputes having arisen between them, as to the boundary lines of their respective lots, where they adjoined each other, the plaintiff insisting among others upon a line which would include the place alleged to be trespassed upon in his lot, and the defendant contending for a line, as the true one which would include it in his; the parties, on the 19th of November, 1845, entered into an agreement under seal to submit their differences, as to the subject of their boundary lines, to the decision of three arbitrators, who were authorized to establish lines and boundaries between them. The arbitrators, on the same day, met the parties, and after a hearing, made and published their award.

The arbitrators, in their award, which was in evidence, described the line established by them as commencing at the north-east corner of the defendant's land, which was not in dispute, and thence running westerly, by a course described, "to a stake standing on the bank of a ditch, and at the end of a pole fence between the lots of said Clark and Burt, thence westerly by land of said Clark, to a spruce tree in the swamp;" and thence by other courses, not in dispute, to the point of beginning.

The stake and the spruce tree were not in dispute. But it was in evidence, that an old pole fence commenced at the stake, and, at the time of the award, extended in a general westerly direction, about two thirds of the distance, towards the spruce tree, making, however, some five or six angles in its course; and that for the other one third of the distance, after the award, the ends of stakes were found in the ground,

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which were supposed to belong to a fence, though no witness — and there were several who recollected more than thirty years back — ever knew of a fence there.

The plaintiff contended, that the line in question followed the old pole fence as far as it went, and then onwards in the direction of the ends of the stakes to the spruce tree. The defendant, on the contrary, contended, that under the award, the line was a straight line between the two points. The close in dispute was included between these two lines.

The defendant offered evidence to prove that the chairman of the arbitrators, at the time of the publication of the award, notified the parties, that the line in question was a straight line. He also offered to prove, that subsequently to the making of the award, the plaintiff had admitted that the line in question was a straight line, and had offered to pay the defendant for wood which he had cut on the land in dispute. This evidence was not offered to prove title to the land, independent of the award, but as an admission of the plaintiff, that the award called for a straight line.

The presiding judge rejected the evidence, and ruled that the award, as to the line in question, was void for uncertainty. A verdict was thereupon taken for the plaintiff, and the defendant alleged exceptions.

J. G. Abbott, for the defendant, argued, that the evidence rejected did not go to contradict, but only to explain and apply, the award; that the words "by land of Clark," did not mean the line as it was before the award, but afterwards, that is, a straight line; and that these words might, if necessary, be rejected as surplusage.

T. Hopkinson, for the plaintiff.

Dewey, J. We have no doubt, that on a question of the precise location of a boundary line between two adjacent owners, the legal rights of the parties may be fixed by an award of arbitrators, mutually agreed upon, to ascertain and fix the true boundary. The difficulty, in the present case, is of a different nature; and the available ground, for denying any effect to this award, is its own uncertainty as to the line, declared by the arbitrators to be the true boundary line, as

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a part of the boundary; the description is, "to a stake and stones (described,) thence westerly by land of said Clark to a spruce tree in the swamp." The locality of the stake and of the spruce tree are not in dispute; but the question raised relates to the course of the line between these points. The defendant contends, that this line was a straight one between these two points. The rule is quite clear, that in the absence of all monuments, or other extraneous objects, referred to for explanation of the course of the line, a boundary line purporting to run from a defined monument, such as a black oak tree, to another defined monument, as a white oak tree, would be a straight line between those two objects. But when there is any monument, or extraneous matter, introduced into the description, as a part of the boundary, and the line between the two *termini* is required to correspond with or is controlled by such intermediate monuments, then the rule of a straight line neccssarily yields to such other monuments, or descriptive words.

It is also quite clear, that a boundary to this effect, "thence bounded by land of A. B.," is a boundary by a monument, or what is equivalent, and controls the course of the line. The case of *Allen* v. *Kingsbury*, 16 Pick. 235, only decides, that where a boundary line is given in a deed to be run from one given monument to another, it must be deemed to be a straight line, unless a different one is described in the deed. It is true, that in the case cited, the description was, "by the line of the heirs of A. B.," but it is quite apparent, that in fact, in that case, there was no such existing line as that stated in the deed. It was only an imaginary line, passing over the land of the heirs of A. B.; and of course could not be adopted as a controlling boundary, or justify a departure from a straight line between the two points given.

The oral declaration of the chairman of the arbitrators, that the line was to be a straight line, was inadmissible to control the written award. *Withington* v. *Warren*, 10 Met. 431.

It was not competent to give in evidence the declarations of the plaintiff, made subsequent to the publishing of

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the award, that the line was a straight line; nor could the fact, that the plaintiff offered to pay the defendant for wood which he had cut upon the disputed premises, be competent evidence to control the award; the language of that being intelligible and certain. The party making such admissions might have mistaken his legal right, and is not to be estopped thereby from maintaining what may be his legal title. The case of *Allen* v. *Kingsbury*, above cited, is a strong case to sustain the ruling of the court excluding parol evidence as incompetent to vary or control the written award.

Exceptions overruled.

DANIEL MCELROY & Wife *vs.* THE NASHUA AND LOWELL RAILROAD CORPORATION.

4c 400
148 218
148 481
4c 400
160 263
4c 400
182 214

The proprietors of a railroad, as passenger carriers, are bound to the most exact care and diligence, not only in the management of their trains and cars, but also in the structure and care of their track, and in all the subsidiary arrangements necessary to the safety of passengers.

A railroad company are responsible for an injury, sustained by a passenger in their cars, in consequence of the careless management of a switch, by which another railroad connects with and enters upon their road, although the switch is provided by the proprietors of the other road, and attended by one of their servants, at their expense.

THIS was an action on the case to recover damages of the defendants, for an injury alleged to have been sustained by the female plaintiff, while riding as a passenger in the defendants' cars from Lowell to Nashville. The case was submitted to the court upon an agreed statement of facts.

The defendants are common carriers, carrying passengers for hire between the above-mentioned places, and the female plaintiff had taken her passage, and paid the fare, from Lowell to Nashville, in the evening train of the defendants.

By the thirteenth section of the act of incorporation granted to the defendants by the legislature of New Hampshire, power was reserved to authorize any other railroad corporation to connect with, enter upon and use the Nashua and Lowell railroad, at a point where the Concord railroad

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was afterwards made to enter upon the same, and at the point where the alleged injury was incurred. After the incorporation of the defendants, the legislature of New Hampshire also incorporated the Concord Railroad Corporation, and granted them the right to connect with and enter upon and use the Nashua and Lowell railroad, at the point where they did enter the same, and where the accident happened.

The Concord Railroad Corporation, in accordance with the powers thus granted, made a switch and connecting track in the defendants' road, so as to pass to and from the same, and entered thereon and placed a switchman there, to let the Concord cars pass on and off the road. This switchman, at the time of the accident, and ever before, was the servant of the Concord Railroad Corporation, and was in no wise the servant of the defendants, or in any manner under their authority or control. By an arrangement between the two corporations, the defendants hauled the cars of the Concord Railroad Corporation over their road to Lowell, after they had entered thereon, and also hauled them back from Lowell to a point about a fourth of a mile below the junction of the Concord railroad, and there detached them and went on over the switch to the end of their road, leaving the Concord train to follow by force of the momentum previously given to them, but at so slow a speed, as to arrive at the switch, after the defendants' train had passed, and then to be switched off by the switchman upon the Concord railroad.

On the evening in question, the Concord train was detached as usual, and the defendants' cars, in the rear one of which the female plaintiff was, passed on, and the engine, tender, and forward car passed over the switch in safety, but by the carelessness of the switchman, the switch became changed, so that the defendants' baggage car, and the passenger car above mentioned, were turned off upon the Concord railroad, and broken from the forward cars, and thereby and thereon the injury was occasioned, for which this action was brought.

The defendants were incorporated by the legislature of New Hampshire, to build that part of their road which lies

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in that state, and by the legislature of this commonwealth to build that portion of their road which is in this state; and the two corporations were afterwards united by acts of the legislatures of this commonwealth and New Hampshire. The point where the accident happened is in New Hampshire.

The question of damages only was submitted to the jury, and a verdict taken by consent for the plaintiff, upon the facts as above stated, subject to the opinion of the whole court.

J. G. Abbott, for the plaintiff, cited *Ingalls* v. *Bills*, 9 Met. 1; Story, Bailm. §§ 601, 602; Ang. Car. §§ 536, 537, 538; *Stokes* v. *Saltonstall*, 13 Pet. 181; *Bostwick* v. *Champion*, 11 Wend. 571; *Cole* v. *Goodwin*, 19 Wend. 251; *Waland* v. *Elkins*, 1 Stark. R. 272.

T. Wentworth, for the defendants, cited Ang. Car. §§ 521, 523; Story, Bailm. §§ 590, 602; *Bennett* v. *Dutton*, 10 N. H. 481; *Hawkins* v. *Hoffman*, 6 Hill, 586; *Boyce* v. *Anderson*, 2 Pet. 150; *McKinney* v. *Neil*, 1 McLean, 540.

Shaw, C. J. The court are of opinion, upon the facts agreed, that the defendants are liable to the plaintiffs for the damage sustained by the wife, whilst travelling in their cars. As passenger carriers, the defendants were bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of passengers. The wife having contracted with the defendants and paid fare to them, the plaintiffs had a right to look to them, in the first instance, for the use of all necessary care and skill. The switch in question, in the careless or negligent management of which the damage occurred, was a part of the defendants' road, over which they must necessarily carry all their passengers; and although provided for and attended by a servant of the Concord Railroad Corporation, and at their expense, yet it was still a part of the Nashua and Lowell railroad, and it was within the scope of their duty to see that the switch was rightly constructed, attended and managed, before they were justified in carrying

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passengers over it. Had the action been, in form, on the implied contract of the defendants, in undertaking to carry a passenger, to have a safe road, and apply and use all necessary care and skill, the liability of the defendants might have been more clear and manifest; but the duty is the same, and in most cases of this kind of carelessness, negligence or want of due skill, in the performance of duty undertaken to be done for hire and reward, it is at the election of the plaintiff to declare in assumpsit, and rely on the promise, or to declare in *tort*, and rest on the breach of duty. Whether the plaintiffs might have maintained an action on the case against the Concord Railroad Corporation for the negligence of their servant, or whether the defendants may have a remedy over against the Concord Railroad Corporation, by the terms of the statute under which the latter were allowed to come on to the defendants' road, or by the terms of their contract, we give no opinion. *Waland* v. *Elkins*, 1 Stark. R. 272.

Judgment on the verdict for the plaintiffs.

DANA CLOYES & Wife *vs.* HIRAM SWEETSER & others.

4c 403
177 s516

If two deeds or instruments are executed at the same time, between the same parties, and respecting the same subject, the terms of one of them may be considered in construing the other, if the terms of the latter are ambiguous.

Where a grantor conveyed "one undivided half of all the buildings that are situated on the homestead I now improve and occupy with the land under and about the same;" and on the same day, the grantee made a lease in writing, not sealed, to the grantor of "one half of all the buildings and land under and adjoining the same, situated in R., it being the homestead of the said grantor;" it was held, that the lease might be considered in construing the deed, and that by the deed an undivided half of the entire parcel upon which the buildings stood, with the land immediately adjacent, all together constituting the homestead of the grantor, passed.

THIS was a petition for partition, which was submitted to the court upon an agreed statement of facts.

John Sweetser, by his deed dated September 10th, 1842, conveyed to the petitioners, with two other parcels of land, an estate in South Reading described as follows: "One

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undivided half of all the buildings that are situated on the homestead I now improve and occupy with the land under and about the same."

On the same day, the petitioners made a lease, in writing, but not under seal, to John Sweetser, of several parcels of land therein described, "to hold for the term of his natural life, from this tenth day of September, yielding and paying therefor the rent of fifty dollars annually." The first parcel mentioned in this instrument was thus described: "One half of all the buildings and land under and adjoining the same situated in said South Reading, the north-westerly part thereof, it being the homestead of the said John Sweetser."

The premises described in the petition, which the petitioners claimed in virtue of the deed above mentioned, and of which they demanded partition, comprised the entire homestead of the grantor. The respondents, who were the owners of the residue of the estate not conveyed by the deed to the petitioners, objected that nothing more passed by the deed, than the land under the buildings, with perhaps a strip on the easterly side of the buildings sufficient for a passage way around them.

It was agreed, that for at least thirty years previous to the date of the deed, John Sweetser had been the owner of the premises described in the petition, which he had cultivated partly as tillage, and partly as mowing land, and had occupied the buildings as his residence. The estate comprised about four acres enclosed by a stone wall, and bounded on one side by a road leading from South Reading to Salem, on another side by a road leading from South Reading to Lynnfield, and on two other sides by land of other persons. A part of the premises was enclosed as a garden, and had always been used for that purpose. Another part was enclosed as a front yard to the dwelling-house. A part was separated from the rest, making a yard open to the street, and another part was enclosed and used as a barn yard.

H. W. Smith, for the petitioners.

A. H. Nelson, for the respondents.

Dewey, J. The decision of this case, if it depended solely

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upon the deed of John Sweetser to the petitioners for partition, would present an embarrassing question of boundary, as to the extent of the conveyance effected by that deed. But other instruments, which were executed between the same parties, at the same time, and respecting the same subject or estate, may well be considered in aid of the construction of any particular instrument, the terms of which are ambiguous. *Clapp* v. *Draper*, 4 Mass. 266; *King* v. *King*, 7 Mass. 496; *Jackson* v. *M'Kenney*, 3 Wend. 233; *Jackson* v. *Dunsbagh*, 1 Johns. Ca. 91.

Looking at the lease executed on the same day by Cloyes to Sweetser, reconveying to him a life estate in the premises thus conveyed to Cloyes, it seems very clear, that the conveyance, intended to be made by Sweetser to Cloyes and wife, must have been of an undivided half of the entire parcel upon which the house was situated, with the immediately adjacent lands, all together constituting "the homestead," which is in accordance with the description in the lease. There are strong reasons for adopting this construction of the deed, arising from the want of any certainty of boundary upon any other hypothesis. By the deed, it is certain, that the buildings were embraced in the conveyance, together with some land adjacent; but how much? This by the deed itself is left uncertain, and undefined in its extent. The construction, which we adopt, and which we think authorized from the language of the two instruments, gives a definite tract with precise boundaries. The parties to this deed, knowing the situation of the premises, can hardly be supposed to have had any other purpose, than to extend the boundaries to the well-known monuments, the stone walls, the roads, &c., surrounding the homestead; as they have entirely omitted any reference to other monuments or limits, as to the extent of the land adjacent to the dwelling-house. In this way, we give effect to the two instruments, and thereby establish the boundary of the land conveyed by the deed of Sweetser, as coextensive with the title alleged in the petition.

Judgment for petitioners.

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WYMAN OSBORN *vs.* HENRY J. BAXTER & another.

A sale of a bankrupt's real estate, under an order of the district court of the United States, in which no time or place of sale is fixed by the court, is irregular and void.

THIS was a writ of entry to foreclose a mortgage of certain land in Lowell, conveyed in 1833 by Elisha Fuller, who was then the owner thereof, to Darius Young, by whom the same was immediately mortgaged back to Fuller to secure the payment of the purchase money. This mortgage, having been first assigned by Fuller to William Minot, in November, 1833, came by sundry mesne conveyances to Nehemiah Hunt, who became a bankrupt in 1842, under the law of the United States. The demandant claimed title as mortgagee, under a sale alleged to have been made by the assignee of Hunt, in pursuance of an order of the district court of the United States, at which sale, the bankrupt's interest in the mortgage was purchased by William S. Lovell, by whom the same was afterwards assigned to the demandant.

The tenants claimed title to the demanded premises by virtue of a deed from William Davidson, collector of taxes for the city of Lowell, for the year 1848, by whom the land was sold to pay the tax assessed thereon for that year to Darius Young, as a non-resident proprietor.

Objections were taken by the tenants to the regularity and validity of the proceedings under which the demandant claimed title; and the demandant objected to the validity of the title relied upon by the tenant under the collector's deed; but as the decision of the case turned upon one of the former only, the nature of which sufficiently appears in the opinion of the court, the other grounds of objection are not necessary to be stated.

The case was submitted upon an agreed statement of facts.

J. G. Abbott, for the demandant.

B. F. Butler and *J. P. Robinson*, for the tenants.

SHAW, C. J. The title of the demandant depends upon

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the regularity and validity of the sale under the authority of the district court.

It was objected to the regularity of the proceedings, under which the sale took place: 1st. That there was no sufficient description of the property to be sold; and 2d, That no time or place was specified in the order of the district court, as the time and place of making the sale.

It will only be necessary to consider the second of these objections.

In general, when a sale is made under a statute power, it must appear, that the requisitions of the statute, as conditions precedent to the operation of the power to pass the estate, have been complied with. It is argued for the plaintiff, that as the power in this case was vested in a court of justice, its adjudication upon the subject must be deemed conclusive. Perhaps this is true, as to all matters which precede the order, such as the petition, the meetings of creditors, the choice of assignee, and the like; these precede the order, and upon such particulars the court may be presumed to have acted judicially and finally. But we have no occasion to decide on that point, because the erroneous proceeding relied on, to avoid the sale, is a matter upon which the court did not act, and to which its order did not purport to extend. By the bankrupt law, the district court of the United States was authorized to make all needful rules, in regard to matters in bankruptcy. By the ninth section of the bankrupt act, (5 U. S. St. at Large, 447,) it is provided, that a sale may be made at such time as the court may order, and upon such terms, &c. By the rules adopted by the district court, No. 16, it is provided, that the court shall, by its order, direct the time and place, at which the sale is to be made.

In the present case, it appears that the court did pass an order directing a sale at auction, terms cash; but that a blank was left in the order for the time and place. This was the last act of the court; and, therefore, neither the direction of the statute nor the rules of the court were complied with. The assignee was directed to give fourteen days' notice, so that it does appear, by implication, that the sale could not

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be made consistently with the order within that time. But there was otherwise no limit as to the time within which it might be made, and no intimation in regard to place. It is said, that leaving blank spaces for the insertion of time and place was an authority given to the assignee, to fill the blanks in the order, and thus make it fix time and place. But the answer is, — and we think it conclusive, — that the court could not delegate this power; it was not a ministerial merely, but a judicial power; at least, one requiring the mind of the court to act on; otherwise, the order of such court, so essentially affecting the rights of parties incapable of acting for themselves, would not be entitled to the weight and authority claimed for it.

We are therefore of opinion, that the proceeding was erroneous, that no title passed by this sale, and that the demandant acquired no title by the deed from Lovell to him. This renders it unnecessary to express any opinion upon the validity of the title of the defendants, under the sale for taxes, either upon the question, whether the sale was well warranted, or, if good, what passed by it to the purchaser; and upon these questions we express no opinion. When no title is shown on either side, *melior est conditio defendentis.*

Judgment for the tenants.

THOMAS L. SMITH *vs.* CHARLOTTE A. SHERMAN.

4c 408
147 205

4c 408
170 95

4c 408
173 213

4c 408
175 63

4c 408
175 3 63

4c 408
181 431

After the death of a defendant is suggested on the record, no amendment can be made so as to alter the character of the action, until the appearance of a representative.

An administrator, appointed in another state, on the estate of a person there deceased, may appeal from the decree of a judge of probate in this state, appointing an administrator here.

An action for the breach of a promise of marriage, where no special damage is alleged, does not survive against the administrator of the promisor; and the party to whom the promise is made is not thereby a creditor of the promisor, to whom administration on his estate may be granted.

The act of 1842, *c.* 89, § 1, which provides that the action of trespass on the case for damage to the person shall survive, extends only to injuries of a physical character, and does not include the damage resulting from the breach of a promise of marriage.

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Special damage is that which may be given in evidence to aggravate the damages sued for in an action already pending, or which may be itself a distinct cause of action.

Loss of time, and expenses incurred, in preparations for marriage, are grounds of damage, directly incidental to the breach of a promise of marriage, but not of special damage.

In this case, which was an appeal from a decree of the judge of probate, the facts are sufficiently stated in the opinion of the court.

B. F. Hallett, for the appellant.

J. A. Bolles, for the appellee.

Shaw, C. J. This is an appeal from a decree of the judge of probate, by which, upon the application of the respondent, a female and a minor, John A. Bolles, esquire, was appointed administrator of the goods and estate of John B. Nicolson, described as late of Charlestown, in the county of Middlesex, commodore in the navy of the United States.

This appeal came before one judge of this court, in the first instance, who, finding questions of law only arising in the case, reported it for the consideration of the whole court. From the report, it appears, that Charlotte A. Sherman, who applied for administration on the estate of Commodore Nicolson, had, previously to this decree, in August, 1846, by her next friend, commenced an action against Nicolson, for breach of a promise of marriage, in common form, alleging no special damage. The writ was returnable to the court of common pleas, at the December term, 1846. Several persons were summoned as trustees, who were all afterwards discharged on their respective answers. The officer also returned, that he had left a copy for the defendant with Benjamin F. Hallett, esquire, as his agent and attorney.

The original defendant, who had been residing at the navy yard in Charlestown, as such officer, and who had left that station, his term then having expired, and left the state before the action was commenced, died at Washington, in the district of Columbia, before the writ was returnable, and no appearance was entered for him. Afterwards, and before the application to the probate court, in this county, for the appointment of an administrator, letters of administration had

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been duly granted, first in the district of Columbia, to the appellant, the said Smith, and subsequently to one Johnson, in the state of Virginia, the place of the domicil of the deceased.

Under these circumstances, a question arises, whether such a service was made on the original writ as would have given the court jurisdiction of the parties and of the subject matter, had the defendant survived, he not being an inhabitant of the state at the time, and not having been domiciled in the state, unless such domicil was acquired by him, whilst residing as navy officer, in pursuance of orders and of his duty as such officer on a territory, within the jurisdiction of the United States; and no effectual attachment of property having been made. But as we do not decide the case on that ground, it is unnecessary further to consider it.

This action having been commenced before the decease of the defendant, it was afterwards entered and continued from term to term in the court of common pleas, upon a suggestion of his death, without further action. It is stated, that at the March term, 1847, an amended declaration was filed; but as this was after the defendant was dead, and his death suggested on the record, no amendment could be made, so as to alter the character of the action, until the appearance of a representative. The court of common pleas at the February term, 1848, declined to dismiss the action on motion, because it was not moved, but on the contrary resisted, by the plaintiff; and there was no party competent to appear and make the motion, in behalf of the defendant.

On the 15th of February, 1848, the petition was filed in the probate court, which is the foundation of the decree appealed from in this case. The petition was presented by Charlotte A. Sherman, describing herself as of Charlestown, spinster, representing that she had a large demand upon the estate of the late John B. Nicolson, commodore, deceased; that he died in the district of Columbia, in 1846, leaving property in Charlestown; that he died intestate, and that no person in Massachusetts had yet been appointed administrator on his property, and praying the judge of probate to appoint

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her, or some other suitable person, administrator upon the deceased intestate's estate.

Notice having been issued to the heirs and next of kin of the deceased, a decree was passed, on the 25th of April, 1848, reciting the application and notice, by which John A. Bolles, esquire, was appointed administrator. From this decree Thomas L. Smith, appointed administrator in the district of Columbia as aforesaid, took an appeal.

The first question is, whether Smith is a person entitled to appeal. The language of the statute is very broad: "Any person aggrieved at any order, sentence, decree, or denial of the judge of probate, &c., may appeal." Rev. Sts. c. 70, § 36.

A party is held by law to be aggrieved, whose rights and interests are necessarily affected by the decree. *Smith* v. *Bradstreet*, 16 Pick. 264. And this is equally true, whether the rights to be affected are those which the party has in a personal or representative capacity.

It appears by the facts, that Smith is the principal administrator; that is, that he has been appointed administrator, under the authority of the government of the district of Columbia, where the intestate deceased, being described as late of Washington, in the district of Columbia, and that an administration here would be in its nature ancillary. *Dawes* v. *Boylston*, 9 Mass. 337; *Stevens* v. *Gaylord*, 11 Mass. 256; *Jennison* v. *Hapgood*, 10 Pick. 77; *Fay* v. *Haven*, 3 Met. 109.

The principal administrator, therefore, or administrator appointed in the place of the intestate's late domicil, is the representative of the general creditors, next of kin and heirs; as such he has an interest in defending their rights, and in preventing the expenses which would be incurred by an unnecessary administration, which must fall upon the estate, and ultimately on the principal administrator, in his representative capacity; and this gives him such an interest in the question as will warrant him in resisting it.

If there be no person standing in the relation of creditor, in this state, having a demand against the estate, it is for the heirs or next of kin of the intestate, or the principal administrator representing them, to decide, whether it is for their

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interest to have such administration granted. He therefore has a right of appeal.

This brings us to the question, the principal question in the case, whether the applicant for this administration, Charlotte A. Sherman, had such a suit pending, upon a cause of action, which by law survives, or such a demand in nature of a debt, that as a creditor she was entitled to administration in order to enable her to pursue her just rights.

By the general law, when a person, dying in another state or country, shall leave any estate to be administered within this state, administration thereof shall be granted, &c.; and if the next of kin do not take administration, the judge of probate may commit it to one or more of the principal creditors. Rev. Sts. *c.* 64, § 3. According to the liberal construction given to this statute, one is a creditor within the meaning of it, who has a cause of action against the deceased which by law survives. *Mitchell* v. *Lunt*, 4 Mass. 654; *Royce* v. *Burrell*, 12 Mass. 395. But it is otherwise, if the cause of action does not survive. *Stebbins* v. *Palmer*, 1 Pick. 71. Tested by this rule, it seems to us clear, that the action commenced by the plaintiff, in the lifetime of the deceased, for breach of promise of marriage, is not one the cause of which does survive.

The point was settled upon great consideration in this state, that an action for breach of promise of marriage, where no special damage is alleged, does not survive against the administrator of the promisor. *Stebbins* v. *Palmer*, 1 Pick. 71. And in the same case, it was held, that where no administration had been granted, a decree of the judge of probate, on the application of a person having such a claim against a deceased person, granting administration to a third person, to enable her to prosecute it, was erroneous, and it was reversed on appeal.

The grounds and authorities are so fully stated in the case, that it seems unnecessary to review them. The decision proceeds upon the ground, that whether a cause of action survives or not, does not mainly depend on the form of remedy, as on a tort or contract; but rather whether the damage

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is purely personal, not affecting real or personal property, and that a failure to marry one according to promise is of the latter character.

The more recent statute of 1842, *c.* 89, § 1, was cited. It provides that the action of trespass on the case for damage to the person shall survive. This manifestly extends only to damage of a physical character, as by negligence of carriers, towns, or the like. If the term "person" were used in a broader sense, it would extend to slander and every other possible case of tort, which could not be intended. Most cases had before been provided for, affecting damage to real and personal property, and wilful injuries to the person, as of assault and battery, and imprisonment. Rev. Sts. *c.* 93, §§ 7, 8, 9.*

We think, therefore, that the case is not affected by the statute of 1842, *c.* 89, § 1, and that it must be governed by the case of *Stebbins* v. *Palmer* above cited. This is strongly confirmed by a case, in which the proposition was held, that such an action will not lie, by the administrator of a deceased person, for breach of promise of marriage. *Chamberlain* v. *Williamson*, 2 M. & S. 408; *Lattimore* v. *Simmons*, 13 S. & R. 183.

These authorities speak of cases where no special damage is alleged. The precise extent of this qualification is not explained; the most natural supposition is, that it must be some damage of such a character, that it might be given in evidence, to aggravate the damages, in one action, or be itself the substantive cause of action, as in the case of trespass *quare clausum*, and carrying away plaintiff's goods; the carrying away the goods may be a ground of special damage, or be the cause of a separate action. In this view, all the damage directly incidental to the complaint, the breach of promise, if the principal action falls, must fall with it. In looking at the specification of claims,† set forth by the attorney of the applicant, we can perceive no one which

* As to what is damage to property, see *Read* v. *Hatch*, 19 Pick. 47.

† The following is a copy of the specification referred to: —

"In compliance with the order of this honorable court, said petitioner and

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would be a substantive cause of action. The time lost, and the expenses incurred, in preparation for the marriage, might have been properly specified in making up the aggregate of damage, had the writ been prosecuted, and the case proved; but they would have been strictly incidental. Therefore, if the principal action for breach of promise of marriage could not be maintained, these damages could not be recovered in any form, and a separate action for them would not lie.

Decree appointing an administrator on the estate of John B. Nicolson reversed.

Thomas Wentworth *vs.* Ira Leonard & another

When a case is brought into this court from the court of common pleas by a bill of exceptions, no objection can be taken in this court which was not made in the court below.

If a judge, before whom an action is on trial, is of opinion, that the plaintiff, upon his whole evidence, is not entitled to recover, he may recommend a nonsuit on that ground; if he does so, and a nonsuit takes place, the plaintiff may allege exceptions; but if the judge is of opinion, that there is evidence to be considered by the jury, and declines to order a nonsuit, this decision is no ground for exception.

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appellee files the following statement of her claim on the estate of J. B. Nicolson, deceased: —

1. She claims $480 promised to her by the deceased, as the estimated cost of two years' instruction, in consideration of her contracting an engagement of marriage with him.

2. She claims the amount by her, at his request, expended in the usual preparations to be married, in Providence, and the extraordinary expense by her incurred, at his request, to take her father, mother, and uncle to Providence, as guests at the wedding.

3. She claims the amount of expense incurred by her, in twice sending messengers to said deceased at Washington, at his request, to arrange the time &c., of the wedding.

4. She claims for eight entire months of her time, from December, 1845, to August, 1846, devoted, at his request, entirely to preparations for her expected marriage.

These several items the appellee supposes to be just matters of claim under and by virtue of the said Nicolson's promises to her, made upon good, valuable and sufficient considerations, as herein stated."

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Wentworth v. Leonard & another.

Where the signer of a receipt for goods attached promised thereby to keep the goods safely, and to redeliver them to the officer or his order, on demand, and, also, that if no demand should be made upon him, he would, within thirty days from the rendition of judgment, redeliver the goods, in order that they might be taken on the execution; it was held, that the officer might commence an action on the receipt, after the thirty days had elapsed, without a previous demand.

If goods, which have been mortgaged, and left in the possession of the mortgagor, are attached as his property, and, being receipted for, are redelivered to him, and are subsequently taken possession of, for the purpose of foreclosure, by the mortgagee, to whom the mortgagor releases his right of redemption, before judgment is rendered in the action upon which the goods are attached; these proceedings constitute no defence to an action by the officer on the receipt.

When property attached is receipted for and redelivered to the debtor, the receipter is liable therefor to the officer, whether, by the receipt and redelivery, he becomes the bailee and servant of the officer, to keep the goods as in the custody of the law, or an original contractor, bound, at his peril, to have the goods forthcoming according to the terms of the receipt.

This was an action of assumpsit, brought to recover the amount of an accountable receipt signed by the defendants, and tried before *Wells*, C. J., in the court of common pleas. The writ was dated the 29th of November, 1847.

The plaintiff, who was a constable of the city of Lowell, having a writ in his hands for service, in favor of Grenville Mears and another against John E. Cadmus, attached thereon certain articles of personal property, which he delivered to the defendants, upon their giving their receipt, signed also by Cadmus and Charles Flanders, undertaking for the safe keeping and redelivery of the goods to the plaintiff.

This receipt, which was dated the 28th of January, 1847, after reciting that the signers thereof had received the several articles of property enumerated therein of the plaintiff, the same having been attached by him on a writ against John E. Cadmus, in favor of Grenville Mears and another, concluded in the following terms:—

"We hereby promise and agree safely to keep and to redeliver all the property above mentioned to the said Wentworth or his order on demand in like good order and condition that the same is now in, free from all charge and expense to the above-named Wentworth or the creditor aforesaid; and we further agree that a demand on me shall be considered as binding on me; and we further agree, that if no demand be made upon me, we will, within thirty days

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from the rendition of judgment in the action aforesaid, redeliver all the above-described property aforesaid, that the same may be taken on execution."

Judgment was rendered in the action on which the property was attached, on the 14th of October, 1847; but no demand upon the defendants to redeliver the property to the plaintiff was proved to have been made.

Upon this evidence, the defendant objected that the action could not be maintained; but the judge ruled otherwise, and the trial proceeded.

The defendants then introduced evidence, that previous to the attachment, namely, on the 11th of September, 1844, Cadmus conveyed the property attached, by a mortgage duly recorded, and for a valuable consideration, to John P. Robinson; that about the 1st of March, 1847, Robinson took possession of the mortgaged property for foreclosure; that on the 11th of May, 1847, Cadmus released his right of redemption to Robinson, by whom the property was soon after sold; and that since the sale, the purchaser had been in possession of the property in the same shop which was occupied by Cadmus at the time of the attachment.

The presiding judge ruled that the foregoing proof could not avail the defendants, either as an answer to the action, or in reduction of damages. Whereupon the jury returned a verdict for the plaintiff, and the defendants excepted.

The defendants also took a further objection, in this court, that the action could not be maintained, unless it appeared that the execution was delivered to the officer, the plaintiff, within thirty days after the judgment; and that the court below ruled generally that the action could be maintained, although no such proof had then been given.

T. Wentworth, for the defendants.

A. W. Farr, (with whom was *B. F. Butler*,) for the plaintiff.

Shaw, C. J. This case, which is assumpsit on an accountable receipt for furniture, given by the three defendants to the plaintiff as an officer, for articles of property attached by him on mesne process, as the property of one of them,

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comes before the court, after a verdict for the plaintiff, on exceptions taken by the defendants.

An objection is now taken, that this action cannot be maintained, without proof that the execution was delivered by the plaintiff to the officer within thirty days after judgment, and that the court ruled, that the action could be maintained, though no such proof had then been given. But we think this question is not open here; because no such objection was taken at the trial, so that the judge's attention was not directed to that point.

The execution of the contract was admitted, and the time of the rendition of judgment was proved, but no demand upon the defendants to deliver the property was proved. When it was objected, that upon this evidence, the action could not be sustained, we think the judge was called upon, not to pronounce a judgment on the whole case, which he could not with propriety do in that stage of it, but to put a construction upon the instrument, and decide, whether, upon its terms, the defendants were liable without a demand. Such a question was fairly raised. The defendants, by the instrument, in the first instance, stipulated to deliver up the goods, on demand; and if the contract had stood there, no breach of it could have taken place without a special demand. But in a subsequent clause it was stipulated, that they should deliver them within thirty days after judgment, whether demanded or not. We think that all the judge was called on to decide, in that stage of the case, was, that on the true construction of the instrument, the defendants were liable without a special demand. Had the objection then been made, that the execution had not been delivered to the officer within thirty days, the judge might have decided that it was necessary and the proof might have been supplied, or the plaintiff might have voluntarily offered it, to preclude the question; or, the judge might have ruled that it was not necessary, and then the question would have been open to the defendant on the exceptions. But this was not done; the question is not now open; and it is unnecessary to express any opinion upon it.

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In any other view of this objection, than as a question upon the construction of the contract, and whether there cannot be a breach without demand, it would be a request to the judge, in the nature of a motion, to order or rather to recommend a nonsuit, on the ground, that the plaintiff upon his whole evidence was not entitled to recover. This a judge may do if he is of that opinion, and it is often useful, in order to shorten a trial; and if he does so, it is open to exception on a report of the evidence. But if he is of a different opinion, if he thinks there is evidence to go to the jury, and declines ordering a nonsuit, it is no ground for exception.

Upon the matter of law, on the construction of the instrument, this court are of opinion that the decision of the court of common pleas was correct, and that by force of the last clause in the instrument, the defendants undertook to redeliver the attached property to the plaintiff, within thirty days of the rendition of judgment, though no demand should be made.

The other questions arose upon the matter offered by way of defence, the proof of which was rejected, because the judge was of opinion, that the facts, if proved, would not constitute a defence. The defence offered was in effect, that the goods had been taken from the defendants by a person having a title paramount to the attachment, which they could not resist. The facts proved, or to which proof was offered, were these: That long prior to the attachment made of the goods of Cadmus, by the plaintiff, Cadmus had mortgaged them to Robinson; that Cadmus, with two other persons, gave the officer the receipt in question; that thereupon the goods went back into the possession of Cadmus; that after this, to wit, in March, 1847, Robinson took possession of them; and that afterwards, and before judgment in the plaintiff's suit, on which they were attached, Cadmus released his right of redeeming them to Robinson.

We concur with the court, that these facts afforded no ground of defence. The goods were well attached by the plaintiff, notwithstanding the mortgage of them to Robin

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son; the plaintiff, by force of the attachment, could hold them against every body but the mortgagee; and against him too, until he notified his debt to the officer, which he never did. If the goods remained bound by the attachment, the obtaining possession of them by Robinson, and the release to him by Cadmus, worked no forfeiture, and constituted no title paramount. If Robinson, finding the goods in the hands of his mortgagor, had a right to take possession of them, it was not because he had a title by his mortgage paramount to that of the plaintiff by his attachment, but because, by a redelivery of the goods into the possession of the debtor, the attachment was dissolved, and the mortgagee was remitted to his original title, as if no attachment had been made.

And this brings us to the only remaining consideration. It appears that after the attachment, the goods were restored to the possession of the debtor, upon a receipt given by him and two others, stipulating to have them forthcoming on th judgment.

Now, if by this proceeding the attachment was dissolved, as we suppose it was, then the defendants were not bailees and servants of the officer, to keep the attached goods, as goods in the custody of the law; but they were original contractors, bound, at their own peril, to have the goods forthcoming according to their undertaking.

But it is contended, that the goods still remained bound by the attachment; that the defendants were mere bailees and servants of the officer; and that when Robinson took the goods under a claim of right, the defendants could not resist, and could have no action to maintain their possession; because it has been adjudged, that the receipters of attached property in the custody of the law have not such title or interest, as will enable them to maintain an action.

It would be equally true, that they could maintain no action against a mere wrong-doer, and the argument proves too much. But suppose, for the sake of the argument, that the attachment was not dissolved; that the goods remained in the custody of the law; that the defendants were mere

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bailees and servants; then the title and special property would have been in the plaintiff as the attaching officer, and it would have been the duty of the defendants, as such bailees and servants, to give immediate notice to him, that he might vindicate his and their rights by an action: not having done so, whether the attachment was or was not dissolved by the redelivery, we are of opinion, that the defendants were liable on their obligation. *Exceptions overruled.*

HORACE J. ADAMS & another *vs.* HUGH CUMMISKEY.

4c 420
146 883
4c 420
163 80
4c 420
186 1577

A writ of *scire facias* cannot be lawfully issued, under the Rev. Sts. *c.* 109, § 38, against a trustee, before his default is shown by the officer's return on the execution against him; but a return of the execution, before the return day, will not authorize the issuing of such writ.

The words "within sixty days," in the direction to return an execution issued by a justice of the peace, mean the same as "in sixty days," or "at the end of sixty days."

THE facts of this case are fully exhibited in the opinion of the court.

A. W. Farr, for the plaintiffs.

T. Wentworth, for the defendant.

METCALF, J. This is a writ of *scire facias*, originally returnable to a justice of the peace, and brought into this court by an appeal from the court of common pleas. The facts, on which the case is submitted to our decision, have been agreed upon by the parties, and are as follows:—

The plaintiffs brought an action, before a justice of the peace, against Patrick Croker, and summoned the present defendant as Croker's trustee. On the 6th of June, 1846, Croker and the defendant were defaulted in that action, and judgment was rendered for the plaintiffs. On the 8th of said June, a writ of execution, in the form prescribed for such cases, was issued and delivered to an officer, who, on the 20th of said June, returned it wholly unsatisfied. In his return, he stated that, by virtue of said execution, he had made demand on the defendant, and that the defendant had re-

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fused to deliver or pay to him any goods, effects or credits of said Croker; and that he had also made diligent search for said Croker, and for his goods and chattels wherewith to satisfy said execution, and could not find either. Two days afterwards, to wit, on the 22d of June, 1846, the plaintiffs sued out this writ.

On these facts, the parties have agreed, that "if the execution was properly returned, so as to lay the foundation for a writ of *scire facias*, upon the Rev. Sts. *c.* 109, § 38, the plaintiffs are to have judgment for the amount of the debt and costs recovered against Croker; if not, they are to become nonsuit."

The provision in the Rev. Sts. *c.* 109, § 38, to which the parties have referred, is thus: "If any person, who is adjudged a trustee in the original suit, shall not pay over to the officer, upon demand, goods, effects or credits, sufficient to satisfy the execution, and if the execution is not otherwise satisfied, the plaintiff may sue out a writ of *scire facias* against the trustee, from the same court in which judgment was rendered, to show cause why judgment and execution should not be awarded against him and his own goods and estate for the sum remaining unsatisfied on the judgment against the principal defendant." This section does not, in terms, require that the execution shall be returned before the plaintiffs can sue out a writ of *scire facias*. But a return of the execution was required by *St.* 1794, *c.* 65, § 6, (of which the section now in question was a revision,) in order to warrant the issuing of such writ. The provision in that statute was in these words: "When any execution, issued as aforesaid, *shall be returned not fully satisfied*, by reason of the trustee not discovering and exposing sufficient goods, effects or credits of the principal, or by reason of the officer's not finding sufficient goods or estate of the principal, to the acceptance of the plaintiff, to satisfy the same, the plaintiff may sue out, against the trustees named in such writ of execution, a writ or writs of *scire facias*," &c. And we are of opinion that this provision is not so altered by the Rev. Sts. *c.* 109, § 38, that a writ of *scire facias* can lawfully issue

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against a trustee, before his default is shown by the officer's return on the execution. We are also of opinion that the officer's return of the trustee's default, before the return day of the execution, will not authorize the issuing of such writ. We cannot distinguish this case, in principle, from that of a writ of *scire facias* against bail. By the Rev. Sts. *c.* 91, § 5, "in case of the avoidance of the principal, and the return on the execution, that he is not found, his bail shall be obliged to satisfy the judgment," "unless he shall discharge himself, by surrendering the principal before final judgment against him on the writ of *scire facias*." But it has been decided, that bail cannot be charged for the avoidance of the principal, by a return of *non est inventus* before the return day of the execution; because the bail have a right, at any time, during the life of the execution, to surrender the principal, and exonerate themselves from liability to a writ of *scire facias*. *Niles* v. *Field*, 2 Met. 327; *Rowland* v. *Seymour*, 2 Met. 590. In the first of these cases, it was said by the court, that although the Rev. Sts. *c.* 91, § 5, do "not say, in terms, that bail shall not be liable before the return day, we think the law assumes that the writ [of execution] will be returned at the time when by law, and the precept of the writ itself, it is made returnable." We have no doubt that the law assumes the same thing, in the case of an execution against a principal and trustee, and that the trustee cannot be held liable to a *scire facias* before the return day; because the execution may be "otherwise satisfied," at any time whilst it remains in force, although he has refused to pay over to the officer goods, effects or credits sufficient to satisfy it.

But the plaintiffs contend, that though on an execution awarded by this court, or by the court of common pleas, the officer cannot, before the return day thereof, make a return of a trustee's refusal to pay, which will warrant the suing out of a *scire facias*, yet that an execution, which is issued by a justice of the peace, may legally be returned at any time within sixty days from its date, so as to give to the judgment creditor all the rights which he would acquire by its return on the sixtieth day. In support of this view of

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the law, the plaintiffs rely on the Rev. Sts. *c.* 97, § 9, which provide that "all executions, issued by a justice of the peace, shall be made returnable *within* sixty days from the date thereof; and all executions from the supreme judicial court shall be made returnable *in* six months from their date, and all executions from the court of common pleas, *in* three months from their date, unless," &c.

In order to learn whether the words "within sixty days" authorize the return of a justice's execution before the sixtieth day, whilst the words "in six months," and "in three months," do not authorize the return of other executions until the end of the months, it may be well to examine the previous legislation on this subject. By the provincial statutes of 13 Wm. 3, *c.* 12, 13, 14, prescribing the forms of writs, executions issued by a justice of the peace were made returnable "within sixty days next coming," and executions from the higher courts were made returnable at the next term. By *St.* 3 Geo. 3, *c.* 7, all executions on judgments issued from the court of common pleas, in counties where the court was held twice only in the year, were made returnable "within three months from the date thereof." By *St.* 1783, *c.* 57, § 1, it was directed that executions issued by a justice of the peace should be made returnable "within sixty days from the day of issuing them." Executions from the court of common pleas, when not returnable to the next court, were to be made returnable "within three months;" and executions from the supreme judicial court, when not returnable to the next court, were to be made returnable "at the end of six months." Afterwards the *St.* of 1784, *c.* 28, was passed, "prescribing forms of writs in civil causes." In the form of a justice's execution there prescribed, the officer is directed to make return thereof "within sixty days next coming," as in the *St.* of 13 Wm. 3, *c.* 14. And such, so far as we know, is the form in which these executions have been made, from the year 1701 to the present time. But in the forms prescribed, by *St.* 1784, for executions issued by the court of common pleas and the supreme judicial court, the time of the return was not mentioned The officer was merely

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directed to "make return of this writ." Thus, by the form prescribed in that statute, these executions were not "made returnable" conformably to the directions of the previous *St.* of 1783, *c.* 57. This was soon discovered; and it was enacted, by *St.* 1784, *c.* 59, that all executions, issued upon any judgments in civil causes, should be made returnable at such times as were provided by the several laws of this commonwealth, any thing in the form prescribed by *St.* 1784, *c.* 28, to the contrary notwithstanding; and that the time and place, when and where such executions should be returnable, should be expressed therein. Since the 1st of May, 1785, executions from this court and the court of common pleas have been so made as to conform to the *St.* of 1784, *c.* 59.

From an examination of these various statute provisions, and from our knowledge of the practice under them, we are of opinion that there is not, and never has been, any difference in the legal effect of the different words used to prescribe the times of returning executions; and that "within," "at the end of," and "in" a certain number of days or months, have the same meaning. By *St.* 1783, *c.* 57, as we have seen, executions from the court of common pleas were to be made returnable "*within* three months." Yet it was said by Parsons, C. J., in *Prescott* v. *Wright*, 6 Mass. 22, that these executions were, by that statute, made returnable *in* three months, and were executable at any time on the last day of the three months; thus showing that he knew no difference, in this matter, between the effect of the words "in" and "within" three months. And in the case of a justice's execution, we are of opinion that the words which direct a return thereof "within sixty days," have the same meaning as if they were "in sixty days," or "at the end of" sixty days. *Plaintiffs nonsuit.*

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THOMAS P. SHEPHARD *vs.* JOSEPH BUTTERFIELD & another.

4c 425
191 1496

If an officer enters a building, in which property is stored, and makes a public declaration that all the property therein is attached, and locks up the building, and gives the key to a clerk of the owner, with directions, assented to by the clerk, to keep the property for the officer, these facts constitute a valid attachment of the property in the building.

Where property in a building was attached, and the officer, afterwards, without intending to abandon the attachment, took all the care and custody of the articles, which, from their bulky nature and small value, could reasonably be required, notwithstanding which, the debtor obtained access to the building, and mortgaged the property to a creditor, who, before recording his mortgage, had knowledge of the attachment; it was held, that there was no abandonment of the attachment which the mortgagee could take advantage of.

If bulky articles of property are attached in an open shed, and left there by the officer, without any further actual charge of the same, or notice of the attachment posted up, by him, the attachment is lost, even as against a party having notice.

THIS was an action of trover, tried before *Wells*, C. J., in the court of common pleas, for the conversion of thirty carboys, and a quantity of muriatic acid, soda-cake, salt and coal.

The title of the plaintiff to the carboys was admitted; they having become connected with the other property in the manner hereinafter stated. Both parties claimed title to the residue of the property under one Joseph B. Cummings; the defendants under an attachment dated October 30th, 1847, and a sale on execution of the same property on the 11th of January, 1848; and the plaintiff under a mortgage dated November 1st, and recorded November 2d, 1847; and a demand made upon the officer on the 11th of January, 1848.

There being evidence in the case, tending to show a conversion of different portions of the goods on different days, the plaintiff was required by the court, on the motion of the defendants, to elect which particular act of conversion he would proceed upon; and he thereupon elected the seizure and sale of the goods, on the 11th of January, 1848, as hereinafter stated. This order of the judge was excepted to, but the objection was waived on the argument in this court.

The evidence introduced tended to prove the following state of facts:—

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The said Cummings was engaged in the manufacture of muriatic and other acids. One Thomas A. Covil was in his employ, and acted as his agent, and boarded with him, but did not at that time lodge in his house, though he had recently lodged there, and had not removed his clothes. On Saturday, the 30th of October, 1847, the defendant Hildreth sued out a writ against Cummings, and gave it to the other defendant, Butterfield, who was a deputy sheriff, for service. Butterfield went accordingly to the works of Cummings, who was absent, and into the building or manufactory where all the property except the soda-cake was stored; and declared all the property attached, and gave charge of it to Covil, with directions to lock it up, and to keep it for him. The soda-cake, which was a coarse, bulky article, the residuum of the acid manufacture, was in an open shed, about thirty feet from the manufactory, occupied by Cummings for storage.

The said Covil, in pursuance of Butterfield's directions, locked up the building, and put the key into a desk in Cummings's house, where the books of the concern were kept. He then notified Cummings's wife of the attachment, and left the house for the night. The next day he went to the store, and found Cummings there; he having obtained admission by means of the key left as before stated. Covil then notified Cummings of the fact of the attachment made the day before. This was on Sunday; the attachment having been made on Saturday. Cummings was in the building again on Monday, and also on Tuesday, about an hour before the mortgage was recorded. He, then, in the absence of Covil, took away a part of the property, among which was a large number of carboys similar to those sued for in this action, which Butterfield claimed to have attached on the Saturday previous.

Butterfield came to the place where the goods attached were on Tuesday morning, and, at a time prior to the recording of the mortgage, put another person in possession of the remaining property, with a written authority to keep the property for him. This keeper was on the ground, and had

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possession of the key, and control of the building where the acids were stored, for two or three weeks, when he gave up the key to Butterfield, who retained the same until the time of the sale on the execution, as hereinafter stated. It did not appear that Butterfield, after he took the key, visited the building where the acids were stored, or took any actual charge of the soda-cake, which remained deposited in the open shed; or that he posted up any written notice that the same was attached.

On the 10th of January, 1848, after the property was advertised for sale on the execution of Hildreth, and the day before the sale, Cummings, by the direction of the plaintiff, took the thirty carboys, which are sued for in this action, to the building where the acids were stored, and filled twenty-two of them with the acids. These carboys were the property of the plaintiff. Cummings obtained entrance into the building through the back door, which, by some means not disclosed by the evidence, had been unfastened. He then proceeded to carry away the acids in the carboys, and also other property specified in the attachment and mortgage.

The said Butterfield, hearing of these proceedings, went to the building, stopped Cummings from the further removal of the property, and retook what he had removed, including the carboys so filled with acid. Cummings notified Butterfield that the carboys belonged to the plaintiff, and offered to take away the eight carboys remaining empty. Butterfield refused to give him leave, saying that he claimed every thing that was there or was brought there.

On the 11th of January, 1848, Butterfield sold at auction, on the execution, all the property except the carboys; the acid which was sold remaining in the carboys, where it had been placed by Cummings, by the direction of the plaintiff. None of the property was removed on the day of sale. The next day, Hildreth, who was the purchaser of the acid and soda-cake, removed them, and removed the acid in the carboys, where it had been so placed by Cummings. No other demand for the carboys, or any conversion of the same, than as above stated, was proved.

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When the second keeper surrendered the key to Butterfield, all the doors were fastened; and there was no evidence, that Butterfield had any knowledge that any of the fastenings had been removed; but it was in evidence, that for two or three weeks before the sale on execution, Cummings had repeatedly been in the building through the back door; and that on one occasion, Hildreth and an agent of Cummings had entered and taken away a small quantity of coal. There was evidence, that a person who was then agent of the plaintiff, who wrote the mortgage and took the same after it was executed to the clerk's office to be recorded, had notice of the attachment previous to taking the mortgage to the clerk's office.

The plaintiff contended, that there had never been any valid attachment of the soda-cake, or if any had been made, that it was invalidated or abandoned, by the omission of Butterfield to take and keep possession of the same.

On this point, the judge directed the jury to inquire whether Butterfield did take possession of the property, and whether the agent of the plaintiff had notice of its being attached, before the recording of his mortgage. The judge also directed them to find these facts specifically, and instructed them that if these facts were proved, and if they further found, that Butterfield took all the care and custody of the articles attached, which, from their bulky nature and small value, could be reasonably required, and had never intended to abandon the attachment, then there had been no legal abandonment of the attachment as against the plaintiff.

The jury returned a verdict for the defendants, and answered specifically, that they found, that Butterfield took possession of the soda-cake under his attachment, and that the agent of the plaintiff had notice of the attachment before the recording of the mortgage.

In regard to the carboys, the judge instructed the jury, that the plaintiff, having made his election, was confined to the transactions which took place on the 11th of January, 1848, and that this rendered it unnecessary to decide upon the effect of the refusal to deliver the eight carboys on the 10th

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of January; that if the plaintiff had wrongfully put into his own carboys the acid held under attachment by the defendant Butterfield, the sale by Butterfield of the acid in the plaintiff's carboys was not an act of conversion for which he was legally responsible; nor was the bidding off of the acid by the defendant Hildreth, an act of conversion for which he was responsible; Butterfield not claiming to sell, nor Hildreth to buy, the carboys.

The court further instructed the jury, that the act of Butterfield, in refusing to give up the eight carboys on the 10th of January, was not the joint act of Butterfield and Hildreth; nor was the carrying away by Hildreth of the twenty-two carboys filled with acid on the 12th of January, the joint act of Hildreth and Butterfield.

The plaintiff contended, that there had been an abandonment in law of the attachment; but the court left it to the jury to determine, as a matter of fact, whether there had ever been an actual abandonment by Butterfield of the attachment.

The verdict being for the defendants, the plaintiff alleged exceptions.

A. P. Bonney, for the plaintiff, cited *Hollister* v. *Goodale*, 8 Conn. 332; *Bagley* v. *White*, 4 Pick. 395; *Sanderson* v. *Edwards*, 16 Pick. 144; *Carrington* v. *Smith*, 8 Pick. 419; *Heard* v. *Fairbanks*, 5 Met. 111; *Train* v. *Wellington*, 12 Mass. 495.

J. G. Abbott, for the defendants.

Dewey, J. The lien by attachment of the muriatic acid, and of the other articles in the factory building, may well be sustained. These articles were duly attached, inasmuch as an entry into the building, and a public declaration by the officer that all the property therein was attached; the locking up of the building, in which the goods were; and the placing the key in the hands of an agent, with directions assented to by him to keep the property for the attaching officer; were, taken together, sufficient acts to constitute a valid attachment of the property thus found in the building.

The attachment as to these articles was not lost by any abandonment. The facts stated in the case are sufficient to

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avoid such a result. We perceive no difficulty in sustaining the ruling of the court of common pleas, as to the lien of the attachment upon all the articles returned as attached, except the soda-cakes, as to which the facts are different in regard to the custody of the attaching officer. The inquiry is, then, whether the attachment of these articles was not lost or abandoned? The court below instructed the jury, that if these facts were found to exist, namely: 1st. Actual attachment by Butterfield; 2d. That the plaintiff had notice of such attachment before recording his mortgage; 3d. That Butterfield took all the care and custody of the articles, which, from their bulky nature and small value, could be reasonably required; and, 4th. That the officer never intended to abandon the attachment; then there had been no abandonment of the attachment, that could be set up by the plaintiff. No further question arises as to the carboys; as the court confined the plaintiff to one act of conversion, which, as it is now conceded, was proper.

The facts relating to the soda-cakes, as we understand them, are these: They were in an open shed, about thirty feet from the manufactory, in which the muriatic acid was kept, and which latter building was closed and under a lock and key. After the surrender of the key of the building, by the agent who had the same, to the officer, the officer took no actual charge of the soda-cakes, which remained deposited in the open shed, and while there the same was transferred by mortgage to the plaintiff.

If these facts shall be in evidence, on a new trial, it will be the duty of the presiding judge to instruct the jury, that the attachment was thereby abandoned and lost. To preserve an attachment of personal property, the officer must continue in possession of it, either by himself or a keeper; and mere notice that an attachment was made of the articles is not enough to prevent a second attachment of the same articles. *Gower* v. *Stevens*, 1 App. 93. The difficulty in such cases is this; that the party, though notified of the previous attachment, might also know that the attachment had been lost by the default or neglect of the attaching

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officer. *Bayley* v. *White*, 4 Pick. 395. The result is, that the exceptions are overruled, except as to the soda-cakes, in reference to which, upon the facts as stated, the attachment, if ever made, was lost; and to that extent the verdict must be set aside.

Lucius Thompson *vs.* The Lowell Machine Shop.

4c 431
156 3

The provision, in the Rev. Sts. c. 109, § 41, where a trustee answers anew to a *scire facias* against him, that, "Upon the whole matter appearing upon such examination and trial, the court shall render such judgment, as law and justice shall require," extends as well to the costs, as to the charging or discharging of the trustee; and where a trustee, on such examination, was discharged by reason of a mistake, wholly attributable to himself, in his answer to the original suit, he was adjudged to pay costs to the plaintiff, and to recover none for himself.

Shaw, C. J. This is a writ of *scire facias* commenced in the police court of Lowell, against the defendants, on a judgment recovered in that court, against John Brooks as principal, and the defendants as his trustees.

In the original suit, the defendants appeared and answered, and by their answer charged themselves as the debtors of Brooks, in a sum not precisely stated, but about $20. By the return of the execution, it appears that they paid thereon $11. And now on this *scire facias*, the defendants were permitted to file an additional answer, by which they stated, that by mistake they had omitted, in their former answer, to disclose an order, by which $9 of the sum so due from them to the principal debtor had been transferred to one Fisher, before the service of the trustee process on them, of which they had no notice. Deducting the $9 from the sum admitted in their original answer, it appears, that the defendants have paid over on the execution the amount in their hands. No terms were imposed as a condition, on which the defendants were permitted to file an additional answer on *scire facias*.

Upon this answer the trustees were discharged, and the court adjudged that the plaintiff should recover costs of the defendants, and that the defendants should recover no costs.

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From this judgment the defendants appealed to the court of common pleas, and from the judgment of that court to this.

By the old statute of 1794, *c.* 65, § 6, a trustee, who had answered on oath in the original suit, could not make any further answer on *scire facias*. This often proved a great hardship on a trustee, who had made any mistake in his answer, or whose relations with the principal defendant had been varied by matter subsequent.

To avoid this inconvenience, and the injustice which the former statute would occasionally work, a different provision was adopted by the Rev. Sts. *c.* 109, § 41, which provides, that on *scire facias*, if the trustee had been examined in the original suit, the court might require or permit him to be examined anew. But this might afford the defendant a ground of discharge in a case, where, at the commencement of the *scire facias*, the plaintiff had a good cause for proceeding, on the former answer; it was therefore further provided, in this, and some other cases enumerated in the same section, that the court, upon the whole matter, should render such judgment as law and justice might require. Such judgment may extend not only to charging or discharging the trustee, but also to the costs; and the statute makes the costs depend on the justice as well as the law of the case, according to the circumstances. Cases may easily be imagined, where, upon the new matter disclosed, the defendant would not be subject to costs, but entitled to costs; as if it should appear that the trustee had been led into any mistake in his original answer, by the default or misconduct of the plaintiff himself, by fraudulent conduct or suppression of truth. We think, therefore, that this statute was not intended to make the costs depend upon the fact of the trustee being charged or discharged, by an inflexible rule, but to depend upon a full view of the equities, and the justice of the case.

In applying this rule, we have no hesitation in affirming the former judgment in this case. The plaintiff, when he sued out his writ of *scire facias*, had a good right to bring it and recover $9, as a sum acknowledged to be in the hands of the trustee, and appearing, by the return of the officer, not to be

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paid over. By a mistake of the defendants, to which the plaintiff in no degree contributed, the defendants had failed to deduct the $9, and upon disclosing this on their new answer, they were rightfully discharged. But the result, being attributable wholly to the defendants, and not in any respect to the plaintiffs, requires that the former should bear the loss occasioned by it.

It is stated here, that payment of costs was not prescribed as a condition of receiving the amended answer. We think the authority of the court is not limited to that mode. In the cases of *Bickford* v. *Boston & Lowell Railroad Corp.* 21 Pick. 109, and *Burnside* v. *Newton*, 1 Met. 426, it was so ordered, and we think very properly, under the circumstances. But we think that the Rev. Sts. *c.* 109, § 41, may make the judgment, in regard to costs, depend on the facts disclosed by the answer; and the judgment founded on these facts, it is obvious, cannot be passed till after the answer is made by which they are disclosed.

Judgment of court of common pleas affirmed.

Jonathan Ladd, for the plaintiff.

H. G. O. Corliss, for the defendant.

JACOB G. DAY *vs.* JAMES D. GREEN & another.

Where a by-law of a city prohibits the moving of buildings through the public streets, without a license granted by the mayor and aldermen, the board of aldermen cannot delegate to the mayor alone the power to grant such licenses.

The mayor of a city, who, under the authority of an order of the board of aldermen, which they had no power to pass, has granted a license for the moving of a building through the streets, is not estopped, in an action of trespass against him, for removing the building out of the street, where it has been left by the owner in the course of such removal, to set up the invalidity of the license.

THIS was an action of trespass, for taking and carrying away certain articles of personal property consisting principally of a building then standing on wheels, and certain implements and machinery commonly used in the removal of buildings.

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The defendants severally pleaded the general issue, and as special matter of defence alleged, that the plaintiff left the building, and other articles mentioned in his writ, in a highway in Cambridge, known as Harvard street, whereby the street was incumbered and rendered unsafe for travellers, and that the defendant Green, as mayor of the city and chairman of the board of highway surveyors, and the other defendant, Coolidge, as superintendent of streets, removed the building from the street, as they had a right to do.

The case was tried before *Fletcher*, J., from whose report, it appeared to be as follows: —

It was admitted that Green was mayor and chairman of the board of highway surveyors, and Coolidge superintendent of streets, at the time of the alleged trespass, as stated in the specification of defence.

It appeared that one Flanagan bought the building in question in January, 1848, and contracted with the plaintiff to move it from where it stood, near Harvard street, to a lot of land near the Observatory.

By the sixteenth section of the act of 1846, *c.* 109, "to establish the city of Cambridge," the city council is authorized "to make all such salutary and needful by-laws, as towns, by the laws of the commonwealth, have power to make, and to annex penalties, not exceeding twenty dollars, for the breach thereof."

In pursuance of this provision, the city council of Cambridge made an ordinance, for the appointment of a superintendent of streets, with the usual functions of such officer, in the care and oversight of the public streets. The city council also passed a by-law "to prevent unlawful and injurious practices in the streets and other public places in the city," prohibiting, among other things, the removal of buildings in the streets, except by a license for that purpose, granted by the mayor and aldermen.

On the 10th of May, 1847, it was ordered, in the board of aldermen, that the mayor be authorized to grant licenses for the removal of buildings over the public highways, and for the obstruction of sidewalks, in all cases in which he may

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deem it expedient, under the regulations and upon the conditions prescribed by the city ordinance above mentioned.

The plaintiff procured a license in writing, dated January 28th, 1848, and signed by the defendant Green, as mayor, of which the following is a copy: —

"Pursuant to an order of the board of aldermen, license is hereby granted to Jacob G. Day to remove one building twenty by sixteen feet in dimensions, and another about twelve by fifteen feet, from the lot on which they now stand on Harvard street, through said Harvard and Main streets, Harvard square, Washington street and Concord avenue, to a lot on said avenue a little west of the Observatory; and if either of said buildings should of necessity remain on the street over night, a clear passage of at least fifteen feet in width shall be left for the public travel, and two lights kept burning; he, the said Day, being required to conform to the provisions of the 'ordinance to prevent unlawful and injurious practices in the streets and other public places in the city.'"

The plaintiff took down the chimneys of the house, and after separating the two-story part from the one-story part, moved the former to the side of Harvard street; and afterwards, at an early hour on Saturday, January 29th, moved the building into the street, placed it on wheels which he had hired for the purpose, and attempted to move it up Harvard street, towards the lot on which he was to place it; but finding, after repeated trials, that he could not do so, owing to the condition of the streets, the weather being stormy, and the streets very muddy, he moved the building about two hundred and fifty feet in the opposite direction, down the hill to the end of Cross street, and there left it, about one o'clock in the afternoon of the same day. Harvard street was fifty feet wide, and much travelled by teams and pleasure carriages.

In the afternoon of Saturday, and after the plaintiff had left the building, the defendants severally notified the plaintiff to remove the building, as an obstruction to the travel; the defendant Coolidge acting in all he did in the case under the orders of the mayor. The defendants, at the same time, told the plaintiff, that the building could not be permitted to remain on the street over the Sabbath, on account of the danger to travellers.

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On the evening of the same day, the defendants took possession of the building, and moved it a short distance out from the travelled part of the street, and there left it on the wheels. On the following Monday morning, the plaintiff applied to Green for permission to move the building to the lot originally intended for it; but was told that he could have no such permission, unless he would first pay the expense, which had been incurred by the defendants in moving it on Saturday.

The defendants contended, among other things, 1st. That the plaintiff had not shown such a property or possession, especially of the building, as would enable him to maintain this action; 2d. That the city council could not legally authorize the mayor and aldermen to grant a license to incumber a highway, in the manner it was done by the plaintiff; and if they could, 3d, That such authority, having been vested in the mayor and aldermen, by a city ordinance, could not be transferred to the mayor, by an order of the board of aldermen.

But the judge, for the purposes of the trial, overruled these objections, and instructed the jury, that if they were satisfied, that the plaintiff took and had possession of the building, by virtue and in performance of the contract for moving it as stated, then the plaintiff had such an interest in and possession of the property in question, as would sustain the action; that the license granted by the mayor was valid in law, and authorized the plaintiff to move the building, and thereby to incumber the street, so far as was reasonably necessary for that purpose, and not preventing the public travel; that the plaintiff would be entitled to a reasonable time, under all the circumstances, for moving the building, no time being specified in the license; that there was nothing in the license to prohibit the plaintiff from leaving the building on the street over Sunday, and if he had used all reasonable efforts to get it to the lot it was to stand on, on Saturday, and found that impracticable, he would be justified in leaving it over Sunday on the street; and the defendants would have no right, on that account, to take possession of the building and move it away.

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The jury returned a verdict for the plaintiff; and the defendants excepted.

E. Buttrick, for the defendants.

A. H. Nelson, for the plaintiff, cited to the point that the defendants were estopped to set up the invalidity of the license, *Hicks* v. *Cram*, 17 Verm. 449; *Rangely* v. *Spring*, 8 Shep. 130; Story, Ag. § 264.

Shaw, C. J. This is trespass against the mayor of Cambridge and the superintendent of streets, for taking away and removing a building, found incumbering one of the highways of the city. How far it falls within the power of a municipal corporation, with authority to make by-laws for the reasonable regulation of the use of the streets and highways, to authorize their partial incumbrance by the removal of large buildings thereon, with the necessary incidents of occasional detention, and the temporary total obstruction of a highway, it seems to us, it is not necessary to decide in the present case. That it is often useful and convenient that buildings should be so removed is found by experience; it may often be done, with little or no inconvenience to the public, under suitable and proper restrictions, adapted to each particular case; and therefore it seems highly proper that the power to authorize and regulate it should exist somewhere. Perhaps the power vested in municipal corporations to make salutary by-laws, for the regulation of the highways, is sufficient for this purpose. But the right to do what the plaintiff did in the present case, to move a building on the street, so large as effectually to incumber and obstruct it, and, upon an emergency preventing the complete removal in a single day, to leave it on the street for two or more nights, was not claimed as a common law right to the reasonable use of the highways; but the plaintiff placed his demand wholly upon the validity of his license, and his compliance with the terms and conditions on which it was granted.

Supposing, therefore, that the act incorporating the city of Cambridge, (*St.* 1846, *c.* 109, § 16,) authorizing the city council to make all such salutary and needful by-laws, as towns have power to make, extends to reasonable regulations, in

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regard to the use of the highways, we are to consider how the city council have exercised this power.

By virtue of this provision, the city council passed ordinances, making provision for the appointment of a superintendent of streets, charged, as the designation imports, with the care of the public streets; and they further passed a by-law, prohibiting the removal of buildings in the streets, except by a license therefor, to be granted in each particular case by the mayor and aldermen.

The plaintiff relies upon a license granted to him by the mayor to remove the building in question, and insists that the mayor was duly authorized to grant such license by a vote of the mayor and aldermen. The license is produced, and much of the evidence offered at the trial turned upon the question, whether or not the plaintiff had complied with the conditions, on which it was granted.

But the question of law is, whether the mayor alone had authority to grant such license. It appears by the case, that after the passage of the by-law, by the city council, the mayor and aldermen, in May, 1847, passed a vote authorizing the mayor to grant licenses for the removal of buildings, in all cases, in which he might deem it expedient, under the regulations and upon the conditions prescribed by the city ordinance.

The court are of opinion, that the authority thus vested in the board, organized and acting together as an administrative body, could not be delegated by them to a single member, although the constitutional head of such board, to be exercised according to his views of expediency.

By the organization of city governments in this commonwealth, aldermen are elected with a view to their judgment and experience, their knowledge of what is just to the individual, and necessary to public safety and convenience. When, therefore, such a power is granted to the mayor and aldermen, constituted as they are, to act as one deliberative and administrative body, confidence is reposed in their united wisdom and experience, in deciding both upon the fitness of granting a license, dependent on the local position, the

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width of the streets, the magnitude of the building, the season of the year, and all similar circumstances, and in prescribing the conditions necessary to the public safety and convenience.

And we think this rule is well sustained by authorities. Where by law, two or more justices are authorized to act, they must act together, for this reason, that they should assist each other, and the result of their conference be the ground of their determination. It is deemed not a ministerial act, but a judicial act, in which they are to exercise discretion. *The King* v. *Forrest*, 3 T. R. 38; *Billings* v. *Prinn*, 2 W. Black. 1017. So where commissioners act upon the propriety of granting a warrant to arrest a witness refusing to come on a summons to be examined. *Battye* v. *Gresley*, 8 East, 319.

When such an authority is vested in a committee, or other body, all must have notice. A majority, unless some other number is made a *quorum* by the act or law under which they are organized, must meet and act together, when the act of a majority is the act of the body, unless otherwise determined by their constitution. *Commonwealth* v. *Ipswich*, 2 Pick. 70; *Damon* v. *Granby*, 2 Pick. 345; *Williams* v. *Lunenburg*, 21 Pick. 75.

But it is contended for the plaintiff, that the defendant Green is estopped from setting up the invalidity of a license granted by himself. But the court are of opinion, that the plaintiff cannot avail himself of such an estoppel *in pais*.

An estoppel is to be construed strictly, and if it could avail at all, as against the mayor, it could not apply to Coolidge, who was a public officer, charged with a public duty, to remove all nuisances in the highways. But a more satisfactory, and we think a legal reason extending as well to Green, the mayor, as to the superintendent of streets, is, that the mayor acting in a public capacity, in the exercise of a public duty, and as trustee for the public, could not estop himself from so acting, by his previous personal and unauthorized act. *Fairtitle* v. *Gilbert*, 2 T. R. 169.

On these grounds, the court are of opinion, that the defendants were not estopped from denying the validity of the

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license under which the plaintiff acted. The jury having, for the purposes of the trial, been directed otherwise on these points of law, the verdict must be set aside, and a new trial granted.

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ANNA M. WHITE & another *vs.* THE FITCHBURG RAILROAD CORPORATION.

On the trial of a petition before a sheriff's jury, for an assessment of damages for land taken for a railroad, evidence is not admissible to show the price paid by the respondents, for land adjoining the land in question, under an award of arbitrators mutually agreed upon to estimate the same.

THIS was a complaint against the respondents, for an assessment of the damages for taking the petitioners' land, in the construction of the Watertown branch railroad.

At the trial before a sheriff's jury, the petitioners offered to prove, that the respondents having laid out their railroad through land of Levi Thaxter which was adjoining the petitioners' land, Thaxter made a deed thereof to the respondents, but not being able to agree upon the price, the parties submitted the matter to the determination of arbitrators, who awarded a certain sum to be paid for the land, which was accordingly paid by the respondents.

The sheriff rejected the evidence, and at the request of the petitioners certified his ruling.

A. H. Nelson, for the petitioners, referred to *Wyman* v. *Lexington & W. Cambridge Railroad Co.* 13 Met. 316, 326, in which it was decided, that the price voluntarily paid by a railroad company for land of another person adjoining the land taken, was admissible in evidence, and the court said that "if it had been a price fixed by a jury, or in any way compulsorily paid by the party, the evidence of such payment would be inadmissible;" and he argued that the price paid under the award, could not be said to be "in any way compulsorily paid."

THE COURT, without calling upon *E. Buttrick*, for the respondents, overruled the exception.

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Alvah Kimball *vs.* Albert Thompson.
Same *vs.* Same.
Same *vs.* Same.

When several actions are tried together, which it is in the discretion of the judge to direct, the testimony of a witness who is competent in one is not to be excluded, because it is inadmissible in the others, and may possibly have some effect on the decision of them; but, in such case, the jury are to be directed to confine the testimony of the witness to the case in which he is competent.

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Where several actions of replevin are tried together before the same jury, by order of the judge, a surety in one of the replevin bonds is a competent witness to testify in the cases in which he is not interested, in the same manner as if the actions had been separately tried; and the party offering such surety as a witness cannot be required, before calling him, to substitute a new surety in his place on the replevin bond.

On the question of fraud in a conveyance of personal property, evidence that the vendee afterwards conveyed a portion of it, with other property, to a creditor of the vendor, as security for the debt, the vendee being also liable therefor as surety, is inadmissible to rebut the evidence of fraud.

A conveyance of personal property, by a debtor in embarrassed circumstances, for the purpose (known to the purchaser) of securing the same from attachment, is void as against creditors, although the debtor, at the time, believes that such conveyance is for the benefit of his creditors, and may intend that his creditors shall ultimately be paid.

If tenants in common of personal property make separate conveyances thereof to the same purchaser, one of which conveyances is fraudulent and void as against creditors, the purchaser cannot maintain replevin for such property against an officer attaching the same as the property of the vendors.

If a debtor, whose goods are attached and replevied, takes advantage of the insolvent law, and the defendant in replevin obtains a verdict, he will be entitled, notwithstanding the insolvency, to judgment for a return; and will thereupon be bound to deliver over the property to the assignee of the insolvent, for the benefit of his general creditors.

These were actions of replevin, tried before *Bigelow*, J., in the court of common pleas. The writs bore date, respectively, the 19th of March, and the 28th and 30th of April, 1847.

Before the cases were reached on the trial list, it having been ascertained, on inquiry of the counsel on both sides, that the three cases depended upon the same evidence, and that each of them would occupy a long time in the trial, the presiding judge thereupon stated, that unless the parties could agree, that the trial of one of them should dispose of the others, the cases must be tried together to the same jury.

The counsel for the plaintiff then stated, that it was neces-

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sary for him to use the testimony of a witness, who was a surety in the replevin bond in the first-named suit, and the testimony of two witnesses, who were sureties in the replevin bonds in the two last-named suits, and that if the three cases were tried together, the plaintiff might lose the benefit of this testimony. The judge then referred the counsel to the statute provision (Rev. Sts. *c.* 94, § 55,) giving the plaintiff a right to substitute new sureties, in case it should become necessary to use the sureties in a replevin bond as witnesses. When the cases were reached and came on for trial, the parties not having then agreed that two of them should abide the verdict in the other, the judge ordered the cases to be tried at the same time to the same jury.

The defendant, who was a deputy sheriff, claimed the property replevied, in virtue of attachments of the same on writs in his hands against Edward H. Ashcroft and Henry B. Odiorne.

The plaintiff claimed the property, on the ground of a purchase of the same by him of Ashcroft and Odiorne, who were partners and tenants in common, before the attachments; and, for the purpose of establishing this claim, he introduced evidence to show, that bills of sale of the property were made to him by Ashcroft on the 25th of February, and by Odiorne on the 9th of March, 1846; that there was a delivery of the property to him, and an actual possession thereof by him, after the execution of the bill of sale to him by Ashcroft; and that the plaintiff, as a consideration for such sales, transferred to the vendors certain notes, and also gave Ashcroft a bond to save him harmless from all debts and liabilities due at the time of the sale from the firm of Edward H. Ashcroft and company.

The defendant contended, and introduced evidence to show, that the alleged sales from Ashcroft and Odiorne to the plaintiff were intended to hinder, delay and defraud creditors, and were consequently void. Among other things, it appeared in evidence, that the plaintiff, and also Ashcroft and Odiorne, since the commencement of these suits, had respectively taken advantage of the insolvent law.

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The plaintiff, at the close of his rebutting testimony, offered as witnesses a person who was the surety in the replevin bonds in the two last-named actions, and one who was the surety in the replevin bond in the first-named suit, and requested the court to permit them to testify. This application was accompanied by affidavits, in which the plaintiff made oath to the facts which he expected to prove by the witnesses; that their testimony was material; and that in the circumstances in which he was situated, he was not able to furnish other sureties in their place.

The presiding judge thereupon inquired, whether the witnesses were offered to prove any particular fact relating specially to the case in which they were not sureties; and the counsel for the plaintiff stated, in answer, that they were offered as general witnesses, to rebut the evidence introduced by the defendant to show that the sales in question were made for the purpose of hindering, delaying and defrauding creditors, and not to any particular facts specially applicable to the case in which they were not sureties. The judge thereupon refused to admit the witnesses, unless other sureties were first substituted for them in the replevin bonds.

The plaintiff also offered, as rebutting evidence, a contract or agreement between himself and Earl P. Mason, dated the 31st of March, 1846, after the attachments made by the defendant, and the commencement of one of the actions of replevin against him. By the terms of this agreement, it appeared, that Ashcroft and Odiorne were indebted to Mason in the sum of $1607·19, which was then due, and for which Mason had as security Loring Pickering's note for $1333·33, indorsed by the plaintiff, and secured by a mortgage of real estate; that for the purpose of relieving the note, and of securing the balance of Ashcroft and Odiorne's debt to Mason, the plaintiff conveyed to him certain articles of personal property, which Mason was to sell in whole or in part, and with the proceeds pay the debt of $1607·19; that some of the property conveyed being then under attachment and replevied by Kimball, it was agreed, if his right to the portion attached should fail, that the residue should be held and

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applied, as above stated, and if it should prove insufficient, Mason should have recourse to the note of $1333·33, and the mortgage of the same, for the balance; and that Mason should retain the note and mortgage until the value of the property conveyed should be ascertained, and if the proceeds should prove to be insufficient to pay Ashcroft and Odiorne's note, Mason might then, also, have recourse to the note and mortgage for the residue. The evidence was rejected.

The presiding judge instructed the jury, that a conveyance of property, made by a debtor in deeply embarrassed circumstances, for the purpose of securing the same from attachment by creditors, or of putting it beyond the reach of the ordinary process of law, and taken by the vendee with a knowledge of this purpose, and to aid in effecting it, was fraudulent and void as to the creditors of the vendor; that if the jury, in the present case, were satisfied by the evidence, — the burden of proof being on the defendant, — that Ashcroft and Odiorne, or either of them, being in insolvent circumstances, made the sales to the plaintiff, for the purpose and with the intent of securing their property from attachment, so that it could not be reached by the ordinary process of law, and that the plaintiff, at the time of such sales, or of either of them, knew of the purpose and intent of the vendors and participated therein, then the conveyances were fraudulent and void as to creditors, and the plaintiff could not maintain these actions; and that if they should find that such were the intent and purpose, on the part of the vendors, and that the plaintiff participated therein and aided in effecting such purpose, the sales would be fraudulent and void as to creditors, although the vendors, at the time of making such sales, might have believed that it would be better for their creditors to make them, and have intended in the end that their creditors should receive payment of their debts.

The jury were also instructed, that if they were satisfied by the evidence, that either of said sales, that from Ashcroft or that from Odiorne to the plaintiff, was made with the intent and purpose aforesaid, participated in and aided by the plaintiff, as aforesaid, then the plaintiff could not maintain replevin against the defendant.

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The jury returned a verdict for the defendant in each case; and the plaintiff thereupon alleged exceptions.

It was further objected, in this court, that if a new trial should take place, and the defendant obtain a verdict, he would not be entitled to a return, because Ashcroft and Odiorne, the debtors, having gone into insolvency, since the commencement of these actions, and their property assigned accordingly, the attachments made against them by the defendant were thereby dissolved.

J. A. Andrew and *I. Story, Jr.*, for the plaintiff.

G. F. Farley, for the defendant.

Wilde, J. At the trial of these actions, it was ordered by the presiding judge, that they should all be tried at the same time, and by the same jury, and to this order the plaintiff's counsel excepted. Generally it is within the discretionary power of the presiding judge, in the trial of cases by the jury, to determine when and how the same shall be tried; and to the exercise of such a discretionary power no exception can be sustained. It was so decided in the case of *Witherlee* v. *Ocean Ins. Co.* 24 Pick. 67, in conformity with a well-known and reasonable rule of practice.

It is contended for the plaintiffs, that this rule is limited to cases depending on the same principles and evidence, and that in this case the evidence would not have been the same if separate trials had been allowed; as the surety in the replevin bond in the first-named suit would have been a competent witness in the two other suits, and so the sureties in those suits would have been competent witnesses in the first suit. There seems to be weight in this objection, but it was overruled on the ground that by the Rev. Sts. *c.* 94, § 55, the plaintiff had a right to substitute new sureties, and thereby to qualify the other sureties as competent witnesses. But we are of opinion that the plaintiff could not reasonably be required to procure new sureties, which it might not be in his power to do; and as none were procured, the sureties were competent witnesses, and should have been admitted to testify in the cases in which they were not interested, in the same manner as they might have done if the trials had been

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separate. The jury might have been directed to confine the testimony of the witnesses to the cases in which they were not interested; but in those cases their testimony should not have been excluded, although it might possibly and wrongfully have some effect on the decision of the other cases in which they were not competent. The rules of evidence were the same, whether the actions had been tried together by the same jury, or separately by different juries; each action was to be tried on its merits, and consequently all competent evidence was admissible. On this ground, therefore, the plaintiff is entitled to new trials; but the other exceptions, we think, cannot be sustained.

It has been objected that the plaintiff's contract with one Mason had a tendency to prove, that the sales of property from Ashcroft and Odiorne, alleged to be fraudulent, were made in good faith; or, if not, that the fraud was thereby purged. But we find nothing in that contract which can legally have any such tendency. That contract was made after the commencement of these actions, or one of them, and it contains certain stipulations which were to take effect, if, on the trial of the case or cases, it should be adjudged that the plaintiff's title to the property replevied was not valid, which certainly cannot be material in the decision of the question of title.

Exceptions were taken to the instructions to the jury; in the first place, because they were instructed, that the conveyance of property made by a debtor in embarrassed circumstances, for the purpose of securing the same from attachment, the purpose being known to the purchaser, would be void as against creditors, although the debtor might, at the time of the conveyance, have believed that it would be better for his creditors to make the conveyance, and intended in the end that his creditors should be paid. That this part of the instructions was perfectly correct we cannot doubt. Such a conveyance, although it does not indicate any moral turpitude, is made void by the 13 Eliz. *c.* 5, which declares, that all conveyances made for the purpose and intent to delay, hinder, or defraud any creditor or creditors, shall be utterly void as

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against such creditor or creditors. The language of the statute is clear, and fully supports this part of the instructions; and so are the authorities.

Such a conveyance also is void as against our law authorizing attachments. Every attempt, by a debtor, to violate or evade the law, so as to delay his creditors in the collection of their debts, to the hinderance of the due course and execution of the law, is unquestionably fraudulent and void as against such creditors. But, undoubtedly, an insolvent debtor may make a valid sale of his property, if made *bona fide*, and for a full and valuable consideration. So he may prefer one creditor to another, if not restrained by our insolvent laws; although other creditors may be thereby incidentally delayed or hindered in the collection of their debts. And there is nothing in the instructions to the jury inconsistent with this distinction. According to the instructions, the defendant was bound to satisfy the jury, that the sales to the plaintiff, or one of them, were made for the purpose and with the intent to secure the property from attachment, so that it could not be reached by the ordinary process of law; and that the plaintiff, at the time of the sales, knew of such purpose and intent, and participated therein. *Cadogan* v. *Kennett*, Cowp. 432; *Estwick* v. *Caillaud*, 5 T. R. 420; *Meux* v. *Howell*, 4 East, 1; *Harris* v. *Sumner*, 2 Pick. 129; *Widgery* v. *Haskell*, 5 Mass. 144; *Hendricks* v. *Robinson*, 2 Johns. Ch. 283; *Trotter* v. *Watson*, 6 Humph. 509; *Bridge* v. *Eggleston*, 14 Mass. 245.

But it is further objected, that the instruction was erroneous in authorizing the jury to find for the defendant, if they were satisfied from the evidence, that either one of said sales was void as aforesaid. The answer to this objection is, that the property replevied was held in common by the vendors Ashcroft and Odiorne, and if either deed was void, the plaintiff would have a title to only an undivided share of the property, for which replevin could not be sustained. *Hart* v. *Fitzgerald*, 2 Mass. 509. If either Ashcroft or Odiorne was the owner of an undivided share of the property attached, the taking by the officer was lawful. If hereafter

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he should sell the whole property or convert it, and the plaintiff could prove he was entitled to a share thereof in common, he would have a remedy in another form of action, to which the judgment in this case would be no bar.

Another question, although not raised by the exceptions, has been argued by counsel, as it may be raised, should a verdict on the new trial be again for the defendant.

It is objected by the plaintiff's counsel, that the defendant would not in that case be entitled to a return of the property replevied, because Ashcroft and Odiorne, since the commencement of these actions, have petitioned for the benefit of the insolvent laws, and all their property has been duly assigned under the petition by the master in chancery, whereby the attachments made by the defendant have been dissolved. But we are of opinion that, notwithstanding the dissolution of the attachments, the defendant is entitled to a return; whereupon he will be bound to deliver over the property to the assignee for the benefit of the general creditors; and if he should fail so to do, the assignee will have his remedy against a responsible person. This property, having been unlawfully taken from the possession of the officer, ought to be restored to him for the benefit and security of whoever may have a right to it, and is not to be left in the possession of the plaintiff, who has no title, and has been adjudged an insolvent debtor. *Exceptions sustained, and new trials granted.*

THOMAS S. HARLOW *vs.* NATHAN TUFTS, JR., & another.

This court have jurisdiction, under the general supervisory power conferred upon them in matters of insolvency by *St.* 1838, *c.* 163, § 18, to revise the proceedings of a judge of probate, master in chancery, or commissioner in insolvency, under the *St.* 1846, *c.* 168, § 1, against persons charged with fraudulently embezzling, or disposing of any of the estate of an insolvent debtor.

The purpose of *St.* 1846, *c.* 168, § 1, authorising proceedings against any person suspected of having fraudulently received, &c., any of the estate of an insolvent debtor, is intended not only to provide for the investigation of cases of actual fraud, in which the property of an insolvent is obtained without consideration, but also to enable creditors or those interested to discover and pursue property, which is so

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withdrawn from the assets of the insolvent, that it cannot be applied in satisfaction of his general creditors.

The provisions of *St.* 1846, *c.* 168, § 1, authorizing proceedings "against any one suspected of having fraudulently received, concealed, embezzled, or conveyed away any of the money, goods, effects, or other estate" of an insolvent debtor, extend to fraudulent conveyances of real estate.

THIS was a petition, under the general jurisdiction of this court in matters of insolvency, by the assignee of Alexander Gregg, an insolvent debtor, in the nature of an appeal from an adjudication of the judge of probate for this county, before whom the proceedings in insolvency were pending.

The petitioner presented a petition to the judge of probate, setting forth that he was the assignee of the said insolvent; that on the 31st of December, 1847, within six months previous to the filing of his petition for the benefit of the insolvent law, the insolvent sold and conveyed to Nathan Tufts, Jr., and Gilbert Tufts, Jr., the respondents, his equity of redemption in a certain lot or parcel of land particularly described in the petition; that the consideration named in the deed was $1200, which, with the sum of $800, for which the estate was previously mortgaged to James Russell, was the value of the same; that the conveyance was fraudulent and void as to creditors, and was made by the insolvent to hinder, delay and defraud his creditors, and particularly to prevent Henry L. Stearns, a creditor of the insolvent, from levying the execution, which might issue on a judgment about to be obtained by him, on the said land; that, at the time when the conveyance was made, to the said Nathan and Gilbert, the insolvent was indebted to them on an account, and had previously given them a note, which they had indorsed and procured to be discounted, but of which they were not then the owners, and which did not become due until more than a month after the conveyance was made; that the grantees, at the time of the conveyance, had reasonable cause to believe the grantor insolvent, and had no reasonable cause to believe him solvent; that they took the conveyance for the purpose of securing to themselves a preference over the insolvent's other creditors, in the payment of their debt and liability aforesaid, and for the purpose

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of hindering, delaying and defrauding such other creditors that the grantees still held and retained the said estate; and that many of the facts set forth in the petition, and more particularly those which relate to the knowledge and intention of the grantees, could only be shown through their statements. The petitioner therefore prayed, that the said grantees might be summoned before the judge of probate and required to answer under oath all such questions as might be propounded to them in this behalf, and to be examined under oath upon the matter of the petitioner's complaint.

This petition having been sworn to by the petitioner, and read and considered, together with the matters therein set forth, by the judge of probate, he declined to grant the prayer thereof, on the ground, that the case did not appear to him to be clearly within the meaning and intent of the act of 1846, *c.* 168, § 1, on which the petition was founded.

The petitioner thereupon presented his petition to this court, setting forth more at large the matter of complaint contained in his petition to the judge of probate, together with the proceedings thereon before him. The petitioner, therefore, prayed, that a writ of *subpœna* might be issued to the said grantees, commanding them to appear before this court, or if the court should think fit, before the judge of probate for the county of Middlesex, at such time as the court should appoint, then and there, upon their several and respective oaths, to answer all matters and questions which should be propounded to them, in relation to the said property of the insolvent, and all other matters set forth in the petition; that they be restrained and enjoined from selling or conveying away the estate, or any part thereof, until the final order of the court; and that after such hearing, they be required to convey the estate to the petitioner, as the assignee of the grantor, and to account to him for the mesne profits thereof. The petitioner also prayed for all such other and further relief, as, upon a full hearing, he might be found entitled to, and as law and justice might require.

This petition having been sworn to, and notice thereof given to the respondents, they appeared and put in a general demurrer thereto, upon which the case was heard.

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T. S. Harlow, for himself.

J. Dana, for the respondents.

Shaw, C. J. This is a petition filed by the complainant, as the assignee in insolvency of Alexander Gregg, of Med ford, an insolvent debtor. It is an original petition to this court, in the nature of an appeal from a decision of the judge of probate for this county, before whom such insolvent proceedings are pending.

The petition sets forth the petition presented to the judge of probate, and the matters contained in it, alleges that the judge of probate declined and refused to sustain the petition and grant the prayer thereof, when, in truth, the petition ought to have been sustained and the prayer thereof granted. To this petition, and the notice granted thereon, the respondents have appeared, and put in a general demurrer, which has been argued by counsel. We think the case presents three questions: 1st. Whether this court have jurisdiction to revise the decision of the judge of probate; 2d. Whether the judge of probate had jurisdiction to entertain and act on the petition; and 3d. Whether, upon the merits, the petitioner was entitled to the relief prayed for.

As to the first question, the court are of opinion, that they have jurisdiction under the original insolvent act, *St.* 1838, *c.* 163, § 18, which gives the court a large and general superintending power and jurisdiction of all cases coming under the act. In addition to the power of making general rules, it gives the court authority, in all cases not otherwise specially provided for, upon bill, petition or other proper process, of any party aggrieved by any proceedings under the act, to hear and determine the case. This power was made broad and comprehensive, as we believe, because the legislature were providing a system of very extensive practical operation, and it was manifestly impossible to anticipate and provide for all the particular cases which might arise. This power has been recognized and acted on, in many cases, a few of which it will be sufficient to cite. *Wheelock* v. *Hastings*, 4 Met. 504; *Eastman* v. *Foster*, 8 Met. 19; *Barnard* v. *Eaton*, 2 Cush. 294. The two latter were petitions to revise pro-

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ceedings of a judge of probate and master in chancery, and were sustained.

It may be proper, however, to remark, that although the power thus conferred on the court, is general, they will consider, in the exercise of it, the purpose for which it was given, namely, to reach cases not otherwise provided for; and they will probably therefore be slow to exercise it, until other remedies, to be obtained in the ordinary course of proceeding, have been exhausted.

In considering whether the judge of probate had jurisdiction, it is necessary to look at the original petition, in order to determine what was sought. The petition sets forth the insolvency of Gregg, an insolvency commenced on his own voluntary application, made at a time and under circumstances calculated to induce a belief, that an execution was about issuing against him, and for the purpose of defeating such creditor; that within six months previously thereto, the said debtor, being in fact insolvent, and having no reasonable ground to believe himself solvent, had conveyed a valuable real estate to the respondents, with the intent and purpose of giving them security for a preëxisting liability, as indorsers, and in order to give them a fraudulent preference over his general creditors; and that the respondents had no reason, at the time of receiving such conveyance, to believe that Gregg was solvent.

This petition is founded on the provisions of the statute of 1846, *c.* 168, § 1, providing that every judge of probate and master in chancery, before whom an insolvent proceeding is pending, upon complaint on oath, by any person interested in the estate, against any one suspected of having fraudulently received, concealed, embezzled or conveyed away any of the money, goods, effects or other estate of such insolvent, may cite such suspected person to appear before him and be examined on oath, &c., touching such complaint.

It is argued, that this provision was intended only to investigate actual frauds, cases where the property of the insolvent had been obtained without any consideration; but we think the purpose of the act was to enable the creditors

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to discover and pursue property, which had been so withdrawn from the assets of the insolvent, that it could not be made applicable to the satisfaction of the general debts, to which it ought to be applied. A preference given in the manner set forth in this petition, by the statute of 1841, *c.* 124, § 3, is declared void, and the assignees are empowered to recover the value of it. This puts such conveyances on the footing of conveyances under the old statutes, holding them fraudulent as against creditors, and of course void.

Another argument against the allowance of this petition is, that the statute of 1846, *c.* 168, does not extend to fraudulent conveyances of real estate. This question is certainly not without difficulty. In the first place, it seems to us, that the reason for this rule is as strong in the case of real estate as of personal. The assignee is certainly a person interested within the words of the statute; the right to the property is vested in him, in trust for the creditors, and he is their representative to obtain and apply it. The purpose of the statute seems to be, by a thorough investigation of the case, and an appeal to the conscience of the party suspected, to enable the assignees to judge whether they will proceed to reclaim such property for the general creditors, and to obtain evidence to aid them in prosecuting such claim. But the phraseology of the statute is peculiar. It is, "Any one suspected of having fraudulently received, concealed, embezzled or conveyed away any of the money, goods, effects, *or other estate*," &c. The term "received," and perhaps the term "concealed," will apply to the obtaining of real estate as well as personal. One who takes an apparently legal title to real estate, which is void in consequence of some secret defect or vice, in common parlance, is said to cover up such estate, or to conceal it. But the more plausible objection lies in the other clause. "money, goods, effects or other estate." There is a common and often a useful rule of construction, that when several particulars are named, followed by a more generic term, it is considered, that the more generic term intends only other things *ejusdem generis*, or of the like kind; so that here we ought to hold, that "other estate" means other estate of like

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kind, or personal estate. But we have already observed, that the same reason applies to both real and personal property, from which it may well be inferred that both were intended. But, further, in comparing this clause with that of Rev. Sts. c. 65, § 7, respecting the embezzlement of the goods of a deceased person, under the administration of an executor or administrator, the words are identical with those under consideration, except that the words "other estate" are omitted.

Executors and administrators having no direct concern with any other than personal property, the provision was properly limited to money, goods and chattels. But when the same mode of investigating the property of a living insolvent, under the administration of an assignee, for the general benefit of creditors, is provided, whose authority and duty extend as well to real as to personal property, and the legislature, in adopting the former law, and extending it to the payments of a living insolvent, for some purposes, carefully added, after the enumeration of the several kinds of property in the former act, the words "or other estate," the most natural conclusion is, that they intended to include all the property of such insolvent liable to be applied by the assignee to the payment of debts. The language will well bear this construction, and taking the purposes of the statute and the language together, we think it is the true construction. We are therefore of opinion, that the respondents were bound to appear, pursuant to the citation, and answer interrogatories touching said supposed fraudulent sale, made in the manner set forth in the petition.

The petition of the assignee prayed that the judge would pass an order directing the respondents to convey the estate in question to him. Whether the judge of probate had any authority to grant such relief we give no opinion; but we do not think that the right to the discovery prayed for, given by statute, depended on the power of the judge of probate to grant such relief. It was a statute provision of which the assignee was entitled to the benefit, as far as it went, and with which the respondents were bound to comply.

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Samuel Blanchard *vs.* John Walker.

The proper time for the entry of an action before a justice of the peace is within the hour named in the writ; and if not so entered, the defendant may refuse to appear, or may appear merely for the purpose of moving to dismiss the action.

This was an action of debt, originally commenced and tried before a justice of the peace, and afterwards, on appeal, before *Bigelow*, J., in the court of common pleas. The court ordered the general issue of *nil debet* to be put in, reserving to the defendant the right to make any objection of a preliminary nature; the same not to be considered as waived by the filing of the general issue.

The defendant, before the case was opened to the jury, objected to proceeding further therein, because it appeared by the record of the justice, that the action was not duly entered before him; the writ being returnable on the 28th of July, 1847, at four o'clock in the afternoon, and the justice not being present till half after five o'clock in the afternoon of the same day, at which time he entered the action, and proceeded with the trial. This objection was taken by the defendant before the justice, as appeared by reference to a copy of the record.

The judge ruled, that the action was not duly entered before the magistrate; that the objection had not been waived by the defendant; and that all subsequent proceedings in the case were therefore void. Thereupon, it was agreed by the parties, that a verdict should be rendered for the defendant, reserving to the plaintiff the right to except; and a verdict being accordingly taken for the defendant, the plaintiff alleged exceptions.

S. Bartlett, for the plaintiff.

J. P. Converse, for the defendant.

Dewey, J. We have no direct adjudication in the courts of this commonwealth upon the question, whether the time for the entry of an action returnable before a justice of the peace expires with the expiration of the hour named in the writ. But the practice has been, as we suppose, to a great

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extent, to regard it as thus limited. The form of the writ, as prescribed by statute, clearly indicates the same; leaving a blank to be filled with the hour of the day for the court to be holden; thus differing in form from writs returnable to the court of common pleas, or to this court We are of opinion, that this period of one hour is the proper period for entering such actions before a justice of the peace; and that if not thus entered, the defendant may refuse to appear, or may appear merely for the purpose of moving to dismiss the action. Such appearance having been made, in the present case, for this special purpose, and such motion seasonably made, but overruled, the joining issue and proceeding to trial, under the order of the justice, were not a waiver of the objection to the entry of the action, and the objection is now open to the defendant.

The proper entry is, however, that the verdict be set aside; and that the action be dismissed, with costs to the defendant.

GEORGE FISHER *vs.* DANIEL LELAND, JR., & others.

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171 515
4 c 456
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The maker of a promissory note, which has been transferred by indorsement before it became due, with a notice to the indorsee, that the maker intended to refuse payment, on the ground, that the note was obtained from him by the fraud of the payee, may prove such fraud in defence to an action against him by the indorsee, and for this purpose may give evidence of the admissions of the payee, whilst he was the holder of the note, and before the indorsement.

THIS was an action of assumpsit on a negotiable promissory note, made by the defendant Leland, as principal, and the other defendants, Fogg and Harrington, as sureties, to one James Luke, Jr., or order, and by him, before maturity, indorsed to the plaintiff.

The defendants pleaded the general issue, and filed a specification of defence, in which they set forth that they should undertake to prove that the note relied on by the plaintiff was obtained by Luke, the payee, by fraud and fraudulent misrepresentation and without consideration; of

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all which the plaintiff had notice when he took the note. The defendants further alleged, in their specification, that Leland and Luke, who were formerly partners, dissolved their partnership in March, 1847, Luke assigning to Leland his interest in the concern, and Leland giving Luke the note in question, with others, and a bond to pay the liabilities of the firm; that Luke kept the books of the partnership, and, at the time of the dissolution, knowing that Leland relied on his statements, represented to him that the assets of the concern were greater and the liabilities much less than they were in fact; that he also withheld from Leland knowledge of the fact, that he, Luke, had appropriated to himself certain funds of the concern and the proceeds of certain debts due the same; that he thus induced Leland to give the notes, of which the note in question was one, and the bond above mentioned; and that herein consisted the fraud, misrepresentation, and want of consideration, of which the plaintiff had notice.

At the trial, before *Byington*, J., in the court of common pleas, the defendants offered evidence that the plaintiff took the note with notice that it was obtained by fraud, and would not be paid by any party to it. There was no evidence of the death of Luke, but the defendants then offered to prove by his admissions made while the note was held by him, and before its indorsement to the plaintiff, that he made such representations. To this evidence the plaintiff objected, but the judge admitted it.

In order to show knowledge on the part of Luke of the falsity of these representations, and for other reasons, the defendants offered to prove specific acts of fraud committed by Luke, against Leland, such as misappropriating the assets of the firm, altering the books of account, &c., before and at the time of the making of the note, and as inducements thereto. To this evidence the plaintiff objected, but the court admitted it.

The jury returned a verdict for the defendants, and the plaintiff thereupon alleged exceptions to the above rulings.

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B. F. Jacobs, for the plaintiff.

G. M. Brown, for the defendants.

Shaw, C. J. The single question is, whether, after the defendant had proved that the plaintiff took the note in question by indorsement before it was due, but with notice that the promisors intended to defend on the ground, that the note was obtained by the payee of the maker by fraud, they could give in evidence the fraudulent acts of the payee; and whether they could give in evidence the admissions and confessions of the payee, whilst he was the holder of the note and before the indorsement, to prove such fraud. The distinction appears to be this: that when an indorsee takes a bill or note, by indorsement, before it is due, and without notice of fraud or other matter of defence, he takes it on an independent title by the indorsement, and will not be affected by any payment, set-off, fraudulent consideration, or other matter of defence, which the acceptor or promisor might have had against any previous holder or prior party. He is not in privity with such prior party, does not claim under him, and is not bound by the acts, frauds, or admissions of any such prior party. And in order to give the highest credit and the freest circulation to negotiable securities, transferred by indorsement, in favor of commerce, this principle is held with great firmness and strictness; and by a series of recent decisions, the rule upon the subject, instead of being relaxed, is held with greater strictness than formerly. *O'Keefe* v. *Dunn*, 6 Taunt. 305; *Dunn* v. *O'Keeffe*, 5 M. & S. 282; *Gill* v. *Cubitt*, 3 B. & C. 466; *Goodman* v. *Harvey*, 4 Ad. & El. 870; *Foster* v. *Pearson*, 1 C. M. & R. 849; *Arbouin* v. *Anderson*, 1 Ad. & El. N. S. 498.

But where a negotiable note is found in circulation after it is due, it carries suspicion on the face of it. The question instantly arises, Why is it in circulation, — why is it not paid? here is something wrong. Therefore, although it does not give the indorser notice of any specific matter of defence, such as set-off, payment, or fraudulent acquisition, yet it puts him on inquiry; he takes only such title as the indorser himself has, and subject to any defence which would be made,

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if the suit were brought by the indorser. The note does not cease to be negotiable; the indorsee takes a title, and may sue, but he is so far in privity with his indorser that he takes only his title; and if the defendant could make any defence against a suit brought by such indorser, he can make it against the indorsee.

This rule is settled in the case of a suit by an indorsee taking the note overdue, by a series of authorities, which show not only that such defence may be made, but that it may be proved by the same evidence, by which it might have been proved if the indorser were plaintiff, to wit, the admissions of such indorser, made whilst he was the holder. *Sylvester* v. *Crapo*, 15 Pick. 92; *Barough* v. *White*, 4 B. & C. 325; *Phillips* v. *Cole*, 10 Ad. & El. 106; *Beauchamp* v. *Parry*, 1 B. & Ad. 89. These authorities might be multiplied almost indefinitely.

But the indorsement of a note overdue is only one mode of giving the indorser notice, that there is some matter of defence relied on; if he has express notice, he may take it and may sue the note, but he takes subject to such defence as the defendant might make against the indorser.

The case in an early volume of the reports of this court, *Wilson* v. *Holmes*, 5 Mass. 543, was one where the plaintiff had notice in the form of the indorsement, which was: "Pay T. W., or order, for our use, value received in account." See *Humphries* v. *Blight*, 4 Dall. 370; *White* v. *Nubling*, 11 Johns. 128. In the early leading case on this subject, *Brown* v. *Davies*, 3 T. R. 80, 83, lord Kenyon, who was not disposed to go quite the length of the doctrine held by Mr. Justice Buller, says: "I agree, &c., if it appears on the face of the note to have been dishonored, or if knowledge can be brought home to the indorsee that it had been so." In a note to the same case, in *Taylor* v. *Mather*, where the defence was, that the note was obtained by fraud, and where it was negotiated when overdue, Buller, J., says: "Such a note is negotiable, but if there are any circumstances of fraud in the transaction, I have always left it to the jury, on the slightest evidence, to presume that the indorsee was acquainted with the fraud."

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It seems, therefore, that it is not that the indorsement of a note after it is due is, *per se*, such as to render the note void, or to defeat the right of the plaintiff; but if there are anterior circumstances, such as fraud in obtaining the note, the fact that the indorsee takes it when overdue, is a circumstance of suspicion, which should put him on inquiry, and leads to a presumption that he knew, or by inquiry might know, of such fraud, and is deemed constructive notice of it. It identifies the title of the indorsee with that of the indorser. This being so, actual notice of such fraud, brought home to the knowledge of the indorsee at the time he took the note by indorsement, is equally availing to prove that he is not a *bona fide* holder, and to give the defendant the same ground of defence as he would have had against the indorser. *Exceptions overruled.*

JACOB FARWELL *vs.* MICHAEL ROGERS.

Under an agreement for a conveyance of a lot of land, on payment of the purchase money, a certain amount of which was to be paid annually, "the time commencing at the date of the agreement," the day of the date is to be excluded in the computation; although the agreement provides that the purchaser shall in the mean time have the use of the land.

A stipulation in an agreement for a conveyance of land, that the grantee, in addition to paying the purchase money, shall first clear the land of stones, "at the rate of at least three acres by the year until the whole lot is cleared," "and shall haul the stones into heaps or near the road in places easy of access," to be taken away by the grantor, does not require that the three acres annually cleared shall be cleared in one parcel, but is performed if several parcels or lots are cleared each year, which, taken together, amount to three acres.

THIS was a complaint, originally brought before a justice of the peace, and, afterwards, on appeal to the court of common pleas, tried before *Bigelow*, J., in that court, for the forcible entry and detainer of a certain lot of land in the town of Waltham.

The plaintiff offered in evidence a warranty deed of the premises in question to himself, from one Luke Smith; and proved his possession under the deed subsequent to its date. He also offered evidence tending to show a forcible entry by

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the defendant into the premises on the evening of the 4th or morning of the 5th of March, 1848, and a subsequent detainer thereof by force.

The defendant, having pleaded the general issue and duly specified his defence, in order to show his right to have and retain possession of the premises, offered in evidence an agreement under seal, bearing date March 3d, 1847, between the plaintiff and one William H. Ropes, and an assignment of the same by Ropes to the defendant, bearing date June 21st, 1847.

By this agreement, the plaintiff, in consideration of the covenants therein contained on the part of Ropes, agreed, on the full performance of the same by him, within the time allowed therefor, to execute and deliver to him, or his executors, administrators or assigns, or to any one properly authorized by him to receive it, a good and sufficient deed of the premises in dispute, containing about eighteen acres.

Ropes, on his part, agreed to clear the land of stones, and "to haul them into heaps or near to the road, in places easy of access to a team," "at the rate of at least three acres by the year," until the whole lot should be cleared, "the time commencing at the date of this instrument;" and further, to pay the plaintiff, "at least $100 per annum, with interest upon the whole amount due, annually," until the lot should be paid for, at the rate of $25 an acre.

It was also agreed by the parties, that Ropes should have the use of the premises for the time during which the agreement should be in course of execution, free from all charge; and that the plaintiff should, whenever Ropes should request it, examine into the manner in which the clearing was performed, and should signify in writing his acceptance or non-acceptance thereof; and that the plaintiff should have all the stones cleared from the land, and should remove the same, within one year after they were hauled as aforesaid.

And the agreement provided that if Ropes should "fail to fulfil his conditions for the first year," he should forfeit a certain sum, and the agreement should be void. The other stipulations are not material to be stated.

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The defendant also offered evidence to show that the defendant, subsequent to the assignment, and during the fall and winter of 1847, and up to the 1st of March, 1848, was in possession of the premises, clearing the same of stone, and doing other work thereon; and that Farwell knew of the assignment of the agreement by Ropes to the defendant, and expressly assented thereto.

The plaintiff objected to the admissibility of the agreement and assignment in evidence, on the ground, that the agreement was not in its nature assignable, and that the defendant could not claim any rights under the same, as against the plaintiff. But the court admitted the agreement and assignment in evidence, and on this point instructed the jury, that if they were satisfied that the plaintiff knew of the assignment and assented thereto, the assignment was legal and valid, and the defendant could claim the same rights, under the contract, as against the plaintiff, that Ropes had, or could have claimed, by virtue thereof, if the assignment had not been made.

It appeared in evidence, that a tender of the amount due under the agreement, both for principal and interest, was made by the defendant to the plaintiff on the 3d of March, 1848, and that the plaintiff then refused to receive the tender, for the alleged reason that he had nothing to do with the defendant in the matter. The plaintiff objected to this tender, on the ground, that it was not made in season, according to the terms of the agreement; and that it was invalid, because it was made by the defendant instead of Ropes. The court ruled that the tender was made in due season; and that being made by Rogers, it would be valid, if the jury should find, under the instructions aforesaid, that the agreement was assigned to the defendant, with the knowledge and assent of the plaintiff.

One question raised at the trial was, whether three acres of land had been cleared of stone according to the stipulation in the agreement, and there was much evidence submitted to the jury on this point by both parties.

The plaintiff contended, that by the true construction of

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this part of the agreement, it was necessary to prove that the three acres cleared of stone were in one compact, connected, unbroken body, and that it was not sufficient for the defendant to show, that several lots or parcels of land were cleared of stone according to the agreement, all of which, when added together, amounted to three acres.

The judge instructed the jury, that it was incumbent on the defendant to prove, that three acres of the land had been cleared of stone, in the manner and to the depth stipulated in the agreement; and that it was not necessary, that the part so cleared should all be in one continuous, unbroken, adjacent body of three acres; but if they should find that the several lots or parcels so cleared, when added together, amounted to three acres, that would be a substantial compliance with this part of the agreement.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

P. H. Sears, for the plaintiff.

I. The tender of $100 was not made within the year, as required by the contract.

"At the date of the instrument" necessarily includes the day of the date. "At" denotes simultaneousness, as distinguished from subsequence or priority; as, the mail starts "at" six o'clock; a star passes the meridian "at" twelve o'clock. In all the cases in which the day of the date has been excluded, the preposition used has been either "from" or "after," and the day has been excluded expressly on the specific meaning of those words. In *Bigelow* v. *Willson*, 1 Pick. 485, 495, Wilde, J., says, "I think, therefore, we are warranted by the authorities to say, that when time is to be computed from or after the day of a given date, the day is to be excluded in the computation. So, also, if we consider the question independent of the authorities, it seems to me impossible to raise a doubt. No moment of time can be said to be after a given day, until that day has expired." By parity of reasoning, where the time is to commence at the date, even though the act of dating were on the very last moment of that day, it still cannot be referred to the subse-

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quent day, and as in law a day is an indivisible point of time, the day of the date must necessarily be included. The only cases, in which the expression "at the date" has received judicial construction, are two cited in Rolle's Ab. Estate, (B.) 2, in which it was held, that a lease to take effect "from the day of the date" was void, because the day of the date must be excluded, and then the lease would be a grant *in futuro;* but that a lease to take effect "at the day of the date" was valid, because the day of the date was included, and therefore it was a grant *in præsenti.* See also Powell on Powers, 476; *Seignorett* v. *Noguire*, 2 Lord Raym. 1242, in which last case it was held, that "with the day of the date" included the date. And there is no authority to be found against these.

Even if the preposition used in this case had been "from," instead of "at," still the general current of authorities would require the day of the date to be included. In *Pugh* v. *Leeds*, Cowp. 714, 717, lord Mansfield, after reviewing all the cases, held that the sense of the word "from" (as including or excluding the day of the date) must always depend upon the context and subject matter. The rule, as fixed by subsequent cases, — and it is one which will reconcile them all, — is, that when the day of the date is a *terminus* from which an interest passes, the day of the date is included; but when it is a *terminus* from which a computation of time merely is to be made, the day of the date is excluded. *Pearpoint* v. *Graham*, 4 Wash. C. C. 232, 240; *Donaldson* v. *Smith*, 1 Ashm. 197; *Lysle* v. *Williams*, 15 S. & R. 135; *Hampton* v. *Evenzeller*, 2 Browne, 18. All the cases in this state, in which the day of the date has been excluded, have been mere computations of time, like *Bigelow* v. *Willson*, 1 Pick. 485, and *Wiggin* v. *Peters*, 1 Met. 127. In the present case an interest passes; Ropes went into possession and enjoyment of the property; the case falls, therefore, under the rule including the day of the date.

The other expressions in the agreement, "one hundred dollars *per annum*," "if Ropes fail to fulfil his contract *for* the first year," &c., support this construction.

II. The language of a contract is to be construed accord-

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ing to the understanding and intention of the parties at the time, as gathered from the whole instrument taken together, and from a consideration of the subject matter, interpreting the language in its ordinary and popular sense; and whenever it is ambiguous, taking it most strongly against the party making the stipulation. Chit. Con. 73 *et seq.*; *Sumner* v. *Williams*, 8 Mass. 162, 214; *Gunnison* v. *Bancroft*, 11 Verm. 490; *Gray* v. *Clark*, 11 Verm. 583; *Atwood* v. *Cobb*, 16 Pick. 227, 229; *Davis* v. *Barney*, 2 Gill & J. 382.

The stipulation that the land should "be cleared at the rate of at least three acres by the year," required the three acres to be cleared in one lot, and not in separate parcels. This appears: 1st. From the language used. Where a particular quantity of any subject matter, which is in its nature continuous, is specified, the general understanding is, that the quantity specified is to be itself continuous; as, an order for three yards of cloth; or the employment of a laborer to go upon a tract of land and clear an acre of it for cultivation, or for the sake of the wood. 2d. From the nature of the subject matter, and of the objects and purposes of the parties, as shown by the other parts of the contract, from which it is evident that the plaintiff intended to provide for a certain yearly supply of stones, and that the three acres were intended as a proximate measure of the supply; if not taken in a compact body, the defendant might first select the spots where there were the fewest stones. 3d. Because it would otherwise be impossible, from the intermingling of the parcels cleared in the different years, for the plaintiff to tell whether the defendant had performed his stipulation or not. 4th. The provision that the defendant "shall haul the stones into heaps or near the road in places easy of access to a team," implies that they are to be made as accessible by being placed in heaps, as if hauled near the road, which would be the case if the three acres were cleared in one continuous body, but not otherwise.

J. P. Converse and *Arad Moore*, for the defendant.

E. Buttrick replied.

Wilde, J. Two questions were raised upon the trial of

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this case, as to the rulings of the court to which the plaintiff excepts. The questions arose upon a contract between the plaintiff and one Ropes, which had been duly assigned to the defendant. An objection was made to the introduction of the contract in the defence, which was overruled; but we consider this objection as waived, as it was not noticed upon the argument of the exceptions; and we think it very clear that it cannot be sustained, as it was found by the jury, under the instructions of the court, that the assignment was made with the plaintiff's assent.

The first question, then, to be decided, is whether the tender proved of the sum of money due on the contract was made in season. The contract was dated the 3d of March, 1847, and the money tendered became due and payable within a year from the date. The tender was made on the 3d day of March, 1848, and on that day the money due became payable, according to the decision in *Bigelow* v. *Willson*, 1 Pick. 485. That case was well considered, and the decision is applicable to the present case, for the reasons stated in the opinion of the court. The tender, therefore, was valid without the aid of the Rev. Sts. *c.* 100, § 14, which provides, that the payment or tender of payment of the whole sum, due on any contract for the payment of money, although made after the money has become due and payable, may be pleaded to an action subsequently brought, in like manner, and with the like effect, as if such payment or tender had been made at the time prescribed in the contract.

As to the other question, the defendant, as the assignee of Ropes, was bound to clear the premises from all the stones thereon, in the manner stipulated by the contract; and the plaintiff contended, that as the defendant was bound to clear three acres at least annually, until the whole should be cleared, the three acres to be cleared should be contiguous, and not in separate parcels; so that the plaintiff, who was entitled to the stones, might have a more equal annual supply than he might have if the same were cleared, as it was, in separate parcels. This construction of the contract was not adopted by the court, and we find nothing therein requir-

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ing such a construction. There is no stipulation to that effect, nor can it be inferred from the nature or terms of the contract, that such was the understanding of the parties. Nor does it appear from the report of the case, that any evidence was produced tending to prove that the plaintiff had not, in fact, an average supply of stone, or as nearly so as he would have had, if the clearing had been in one parcel, according to his construction of the contract.

Exceptions overruled.

JOHN BOYNTON *vs.* THE PETERBOROUGH AND SHIRLEY RAILROAD COMPANY.

Where the land of one deceased is taken for a railroad, the heir and not the administrator is entitled to the damages for such taking, and to prosecute for the recovery thereof, although the administrator has previously represented the estate to be insolvent, and afterwards obtained a license to sell the intestate's real estate for the payment of debts.

THE petitioner, in this case, as the administrator of the estate of Oliver Page, having applied to the county commissioners, for an estimate of the damages occasioned by the location of the Peterborough and Shirley railroad over the land of his intestate, and the same having been estimated and awarded to him, the proprietors of the railroad applied to the commissioners to summon a jury to revise the same. The commissioners accordingly ordered a jury to be summoned, and appointed Charles R. Train, esquire, to preside at the trial.

At the trial before the jury, it appeared, that Oliver Page died on the 26th of November, 1846, seized of the land afterwards taken by the respondents for their road; that Boynton, the petitioner, was duly appointed administrator of Page's estate, and accepted that trust; that, on the 12th of January, 1847, the administrator represented the estate insolvent to the judge of probate, who thereupon appointed commissioners to examine the claims against the same; and that the estate was, in fact, deeply insolvent; that the respondents filed the

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location of their road over the land in question, on the 22d of March, 1848; that, on the 11th of April, 1848, the petitioner obtained a license from the judge of probate to sell the real estate of his intestate for the payment of debts; and that Page left one daughter, his sole heir.

The respondents requested the presiding officer to instruct the jury, that upon the facts proved, the petitioner had no such interest in the land taken, as would by law entitle him to recover damages therefor; but the presiding officer, for the purposes of the trial, instructed the jury otherwise, and they returned a verdict accordingly for the petitioner. The respondents excepted to this instruction, and the presiding officer certified the same with the verdict. The court of common pleas ordered the verdict to be set aside, and the petitioner appealed to this court.

G. F. Farley and *F. A. Worcester*, for the respondents.

B. Russell (with whom was *J. P. Converse*), for the petitioner.

Shaw, C. J. This case certainly presents a question of some difficulty. Oliver Page died seized of real estate, leaving one daughter his heir at law. His estate was represented insolvent, and it is conceded, proved to be deeply insolvent; so that the whole of his property, including the proceeds of all his real estate, to be sold by his administrator, under license, was insufficient to pay his debts. After the death of the intestate, and before his administrator had obtained license to sell the real estate, the respondents filed their location, by which a part of said real estate was taken for the railroad. The question is, whether the heir or the administrator has the right to claim and receive the damages for the land thus taken.

No act of legislation has provided for this case, and there is no judicial decision in point. The argument for the administrator carries with it a strong semblance of equity. The policy of the law certainly is, to make a deceased debtor's real estate liable for the payment of debts, and the heir takes his inheritance subject to that liability, so far as it is created by law. But the same law, which has declared this liability

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of real estate for the payment of debts, has prescribed the mode, and the only mode, in which it shall be carried into effect, and that is, by a sale under a license. The heir then takes the estate according to the well-known rule of inheritance, at the time of the decease of the ancestor, subject only to be divested by a sale, pursuant to law, conducted in the manner prescribed by statute. All the legal consequences of this relation are held to follow. The heir is the owner till he is divested; he has the exclusive possession and right of possession; he may take the rents and profits to his own use, and without account. The administrator has no interest or estate, and until a recent statute, not affecting the question, he had no right of entry or action in or to the estate, before license obtained. He had no claim to the rents and profits, and his sale, when made, took effect from the time it was made, and did not relate back to the decease of the ancestor. These are familiar principles, which do not need the citation of authorities for their support.

The right to damages for land taken for public use accrues, and takes effect, at the time of taking, though it may be ascertained and declared afterwards. That time, in the case of railroads, *prima facie*, and in the absence of other proof, is the time of the filing of the location. See *Charlestown Branch Railroad* v. *Middlesex*, 7 Met. 78, and *Davidson* v. *Boston & Maine Railroad*, 3 Cush. 91, 106.

In the present case, the heir at law being seized and possessed of the estate taken, at the time of the taking, subject only to be defeated by a sale, not then made, or authorized and licensed by the competent authority to be made, the court are of opinion, that she was the owner within the meaning of Rev. Sts. *c.* 39, §§ 55, 56, and entitled to the damages, to be recovered of the respondents for such land; and of course that the administrator was not so entitled.

Judgment of the court of common pleas rejecting the verdict for the administrator affirmed.

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Charles Shirley *vs.* Sumner Shattuck.

Arbitrators have no authority in this commonwealth to award costs of arbitration, if no provision is made in the submission to that effect.

Where arbitrators awarded that the plaintiff should recover of the defendant a certain sum of money, and one half of the costs of arbitration, amounting to a sum stated, which they included in the first-named sum, and they had no authority to award concerning costs, it was held, that the award was divisible, and that the part relating to costs might be rejected, and the residue held good.

Where the terms of a submission are general, of all matters and things whatsoever in dispute between the parties, an award of a certain sum of money, to be paid by the defendant to the plaintiff, is sufficiently certain, and a good execution of the submission.

A demand of a greater sum than is due is, in general, a good demand of what is due; it is otherwise, where non-payment of what is due will give rise to a forfeiture.

This was an action of debt on a bond executed jointly by Josiah K. Bennett, of Mason, in the state of New Hampshire, as principal, and the defendant, of Groton, in this state, as surety, in favor of the plaintiff, also of Mason, conditioned for the performance of an award. The trial was before *Byington*, J., in the court of common pleas.

The condition of the bond was, that Bennett, his heirs, &c., should in all things stand to, obey, perform, fulfil, and keep the award, arbitrament, and final determination of John Stevens, George Taft and Willis Johnson, all of said Mason, appointed to arbitrate, award, order, judge, and determine of and concerning all and all manner of actions, causes of action, suits, &c., and demands whatsoever (in the broadest and most comprehensive terms) by and between the parties, so as the award be made in writing, under the hands of the arbitrators, and ready to be delivered to the parties, on or before the 1st of June, 1845.

The arbitrators, after hearing the parties, awarded that the plaintiff should recover of Bennett the sum of $137·60; that the cost of the arbitrators, taxed at $18·15, should be paid equally by the parties; that Shirley having paid the whole of the arbitrators' cost, one half of the same was charged to Bennett, by the arbitrators, and included in the sum of $137·60 awarded to be paid by him; and that as to any

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further cost, which might have been incurred, each party should pay his own.

The defendant objected to the sufficiency of the award: 1st. Because it did not appear therein, what claims were laid before the arbitrators by the parties, or upon what claims the arbitrators made an award in favor of the defendant, or whether beyond the sum awarded for costs, the arbitrators awarded such further sum for damages or for costs; 2d. Because the arbitrators exceeded their authority in awarding the costs of arbitration.

These objections were overruled by the presiding judge.

It appeared in evidence, that the plaintiff having assigned the award, the assignee demanded a performance of it of Bennett; and the assignee testified, (having reassigned the award to the plaintiff,) that it not having occurred to him at the time, whether the arbitrators had a right to award as to costs, he demanded the whole amount awarded.

The defendant objected, that this was not a good demand, inasmuch as the assignee demanded the whole amount of the award, costs as well as damages, and the award being void as to the costs, the demand was therefore insufficient.

As to this point, the presiding judge ruled, that if the assignee demanded the whole sum awarded, (it not occurring to him at the time that the arbitrators had awarded on the subject of costs, or whether they had a right to do so,) and the said Bennett refused to fulfil the award, the demand would be sufficient, unless the ground of his refusal was, that more was demanded than was legally awarded; but if he was ready to pay the sum legally awarded, and refused to perform the whole award, on the ground that more was claimed by it than could legally be recovered, then the demand would not be good.

The jury found a verdict for the plaintiff, and the defendant excepted to the foregoing rulings and instructions.

B. F. Butler and *B. Russell*, for the defendant.

G. F. Farley and *J. G. Abbott*, for the plaintiff.

Dewey, J. This case has heretofore been before the court, and certain exceptions taken to the ruling of the court of

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common pleas, as to the effect of a judgment of the court of New Hampshire, have been overruled. The case upon these exceptions is reported in 13 Met. 256. It is again brought before us, upon further exceptions taken upon a second trial.

The first ground, upon which the last verdict is sought to be set aside, as presented upon the argument, is, that the arbitrators had no right, under the terms of the submission, to award costs; no particular authority to that effect being given them by the articles of submission. Applying the law of Massachusetts to the case, it seems well settled, that the arbitrators had no authority to award costs. *Peters* v. *Peirce*, 8 Mass. 398; *Vose* v. *How*, 13 Met. 243. The law of New Hampshire is otherwise; *Spofford* v. *Spofford*, 10 N. H. 254; and if the submission, hearing and award were all transactions occurring in New Hampshire, the local law would properly apply to the case. There does not distinctly appear sufficient upon the papers accompanying the case, to show that this award was made in New Hampshire, although it appears highly probable from the residence of the parties that it was so. But assuming the fact to be otherwise, we are clearly of opinion, that the award is divisible; and that the part of it, which awards one half of the costs of the arbitration, to be paid to the plaintiff, may be rejected, and the other parts of the award held good. The precise sum thus awarded is named in the award, and may therefore be deducted from the whole sum awarded, without the least difficulty. The case presents no connection between the different parts of the award, which renders it objectionable to treat the award as divisible. If, therefore, the arbitrators erred in awarding one half of the costs to be paid by the defendants, that would furnish no objection to the right of the plaintiff to maintain this action, deducting from the amount of the award the sum included therein for costs.

2. It is said that the award is bad for uncertainty, and the case of *Houston* v. *Pollard*, 9 Met. 164, is relied upon. But an inspection of that case, and of the case of *Rider* v. *Fisher*, 5 Scott, 86, there cited, will indicate at once the broad

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distinction between these cases and the present. There the submission in terms required an award to be made as to several distinct matters, but the arbitrators in their award had omitted to award as to some portion of them. In the present case, the submission was in the most general form, of all demands and controversies whatever, and an award of a certain sum of money, as due from the defendant to the plaintiff, may well be taken to be a full execution of the submission. *Emery* v. *Hitchcock*, 12 Wend. 156; *Gray* v. *Gwennap*, 1 B. & Ald. 106; *Karthaus* v. *Ferrer*, 1 Peters, 222.

3. The next point raised is as to the sufficiency of the demand made upon the defendant. The demand, it is said, was too large; embracing the entire award which of course included the costs awarded. The instructions upon this point were sufficiently favorable for the defendant. They assumed, that if the defendant was ready and willing to pay what was legally awarded to the plaintiff, but refused to pay any thing solely because more was demanded than was legally awarded, the demand would be insufficient. Generally speaking, a demand of a sum greater than that which may be due is still a good demand; and it is the duty of the other party to pay what is due. The case of a demand for a sum due, when non-payment of what is due would occasion a forfeiture, is different. *Bradstreet* v. *Clark*, 21 Pick. 389. But that differs from the general rule upon the subject of a demand.

Exceptions overruled, and judgment on the verdict for the plaintiff.

THE CENTRAL BRIDGE CORPORATION *vs.* ZIBA ABBOTT

A vote by the proprietors of a bridge, that "All the present proprietors of stock therein shall have the right to pass free of toll, with their horses and carriages," is confined to persons, who are then proprietors of the bridge, and does not extend to those who subsequently become the purchasers of stock then existing.

The proprietors of a toll bridge may maintain an action of assumpsit, as on an implied promise, against any one passing over the bridge, who is liable by law to pay toll, although the defendant has always claimed an exemption from such liability, and refused to pay the tolls.

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THIS was an action of assumpsit, submitted to the court of common pleas upon an agreed statement of facts, and, upon the judgment of that court for the plaintiff, brought into this court by appeal.

The defendant, before the commencement of the action, and subsequent to the 14th of March, 1833, had passed over the plaintiffs' bridge, with his horses and carriages, until the tolls therefor, at the rates allowed by law, amounted to the sum of $20; he, the defendant, at all times, claiming a right to pass over the bridge, free of toll, and expressly refusing to pay any toll, when called upon to do so.

The other facts in the case are sufficiently stated in the opinion of the court.

The case was argued in writing by *W. P. Webster*, for the plaintiffs, and by *I. W. Beard*, and *A. J. Gunnison*, for the defendant.

METCALF, J. The plaintiffs' charter (*St.* 1824, *c.* 110,) granted to them certain tolls. By *St.* 1832, *c.* 117, they were authorized to reduce their tolls, and to compound the same in all cases in which they might deem it expedient. This last statute was repealed, one year afterwards, so far as it authorized the compounding of tolls. *St.* 1833, *c.* 218. Four days after the repealing act was passed, to wit, on the 14th of March, 1833, the plaintiffs passed the following vote: "All present proprietors of stock in Central bridge shall have the right to pass free of toll, with their horses and carriages." The defendant was not then a proprietor of stock, but has since become a proprietor of stock which then existed. And he contends that by becoming owner of such stock, he is entitled, by force of the vote, to pass the bridge free of toll; or, to use the language of his counsel, that "the vote intended that the right to pass the bridge, free of toll, should become a concomitant part of the stock which then existed." But the court are of opinion that, by the vote, no one was exempted from liability to pay toll, besides those who then owned stock in the bridge. The "present proprietors" cannot be construed to include future proprietors. On the defendant's construction of the vote, all the owners of stock in the bridge would

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be forever authorized to pass the bridge, toll free, with their horses and carriages. Such a construction and effect cannot be given to the vote, except by an utter perversion of its terms. Nor can the construction of this vote be affected by the previous vote of July 2d, 1832, set forth in the statement of facts. Whether the vote granted to those, who were proprietors when it was passed, an exemption from paying toll for their lives, or only while they should continue to be proprietors, is a question not now before the court, and on which no opinion is given. Their assignees are not exempted, and the defendant is therefore liable to pay toll, to the same extent as any stranger who passes over the bridge.

This view of the case renders it unnecessary to consider whether the votes and proceedings of the plaintiffs, on the subject of tolls, were warranted by their charter, or by St. 1832, c. 117, or by any other law, and leaves only one other question to be decided, namely, whether the defendant is liable in this action of assumpsit.

It is well settled that assumpsit lies for tolls. But the defendant insists that this action cannot be maintained against him, because he has always claimed exemption from liability to pay toll, and also has always refused to pay it. And he relies on the case of *Whiting* v. *Sullivan*, 7 Mass. 107, where it is said that the law will not imply a promise of any person against his own express declaration; because such declaration is repugnant to any implication of a promise. Admitting this to be true, as a general rule, it clearly is not true in those cases in which a party is under a legal obligation paramount to his will. Thus, if a husband wrongfully expels his wife from his house, he is liable in assumpsit to any person who furnishes her with necessary supplies, although he gives notice that he will not be liable for her support. The law imposes on him the obligation to support his wife, and does not consult his will, on the question whether he shall pay for her support, when it is furnished by others, in consequence of his wrongful default. There are numerous instances of the like kind; and the case at bar is one of them.* The

* See 20 American Jurist, 9.

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defendant has passed over the plaintiffs' bridge, and the law obliges him to pay toll, although his will may not consent.

Judgment for the plaintiffs.

JONATHAN LADD *vs.* LYDIA CLEMENTS & another.

The members of an incorporated religious society having accepted their act of incorporation, and organized under the same by the choice of a president and other officers, but never having chosen any assessors or parish committee, or adopted any by-laws directing the manner of calling meetings, five of the qualified voters of such society signed an application to a justice of the peace, requesting him to call a meeting thereof, at a specified time and place, to fill all vacancies in the offices of the society, to do all acts and things necessary to effect a full and complete organization, and to see if the society would confirm their former proceedings and amend their records, so far as might be necessary to render the same valid and effectual in law: It was held, that the society were within the provisions of the Rev. Sts. *c.* 20, § 17, authorising the calling of a meeting by a justice of the peace, on the application of five or more of the qualified voters; and that the meeting called by the justice on such application was properly called and was a legal meeting, although it was not stated in the application, or recited in the warrant, that there were no assessors or parish committee.

Where three out of six signers of an application to a justice of the peace to call a meeting of a religious society according to the provisions of the Rev. Sts. *c.* 20, § 17, were admitted to be qualified voters; a fourth, to whom it appeared by the stock book that one fourth of a share had been issued, had been clerk of the society, and one of a committee to purchase land; a fifth had become a stockholder by an original subscription in the name of the firm in which he was a partner, and by eventually succeeding to the rights of his copartners; and the sixth was a signer in the stock book, and had paid for a share, though no certificate of it could be found, and had acted as a member at former meetings; and all the signers of the application, except one of the first three, were present and acted as members at the meeting called by the justice upon this application, at which meeting ten or more other members of the society were also present: It was held, that a jury would be authorized to find from these facts that the application for such meeting was legal.

THIS was a writ of entry, to recover an undivided forty-first part of a lot of land in Lowell, with a block of buildings thereon, and was submitted to the court upon a statement of facts, agreed upon, after a trial in this court, as a substitute for a report of the judge, before whom the case was tried.

The demandant claimed title to the premises, under the levy of an execution thereon in his favor against the proprietors

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of the First Freewill Baptist Meeting-house in Lowell, on the 19th of March, 1845; the same having been previously attached on the 16th of November, 1842. The regularity of these proceedings was not called in question.

The tenants claimed to hold under conveyances from the said proprietors, made before the plaintiff's attachment.

On the 30th of March, 1836, an act of the legislature was passed, by which Nathaniel Thurston, Samuel Folsom, and Abram S. Holbrook, and their associates, were made a corporation, by the name above mentioned, with the rights and privileges and subject to the duties and liabilities incident to religious societies, and with power to hold real and personal estate, the annual income of which, exclusive of such meeting-house as they might erect, should not exceed $1000, to be appropriated exclusively to parochial purposes.

It appeared by the records of the said proprietors, that a meeting of the corporation was called by Thurston, by means of a notice dated the 9th of August, 1836, (but in what manner the same was served did not appear) informing the persons named in the act, that a meeting of the corporation would be held at a specified hour and place on the 17th of August, 1836, to see whether the proprietors would accept the act of incorporation; to choose all necessary officers; and to determine upon the mode of transacting all other business that might lawfully come before them; and that, at the said meeting, which was held accordingly, the act was accepted, by vote, and a president, treasurer, and seven directors chosen.

It being objected, that the conveyances relied on by the tenants were invalid and without any legal effect, for want of authority, on the part of any person by whom they were executed, to bind the corporation thereby, the tenants introduced evidence, under and subject to objections, on the part of the demandants, that in October, 1836, sundry persons had subscribed an obligation promising severally to take shares in the meeting-house which the proprietors were about to erect; that the proprietors, on the 22d of August, 1836, passed a vote authorizing a committee of three to select and purchase a lot of land for a meeting-house, — to take a

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conveyance thereof in behalf of the proprietors, — to obtain a plan and make an estimate for the building of the house, — and to divide the same into shares of $100 each; and that of said shares, and fractional parts of shares, the number of (blank) in all had been taken up and paid for; but it did not appear, that the proprietors had any formal or written by-laws of any kind, or any other written contract of membership, or that they ever elected any assessors or committee authorized to call meetings.

It was also in evidence, that in August, 1840, the said proprietors having built the meeting-house and block alluded to, and having borrowed or become the depositaries of divers large sums of money, applied to the Lowell Institution for Savings for a loan, and were then advised by the solicitor of that institution to organize anew, and in a more formal manner. An application was accordingly made to the said solicitor, being also a justice of the peace, in writing, signed by six persons describing themselves as proprietors of the First Freewill Baptist Meeting-house in Lowell, requesting him to issue his warrant calling a meeting of the proprietors, at a specified time and place: 1st. To fill all vacancies that might have occurred among the officers of the corporation, and, in general, to do all acts and things necessary to effect a full and complete organization; 2d. To see if the proprietors would confirm their former proceedings, and amend their records, so far as might be necessary to render the same valid and effectual in law; 3d. To see if the corporation would mortgage their real estate, and give such other security as might be necessary, to enable them to procure a loan of $3500, and to do all other acts and things necessary to obtain the same.

This application was dated the 6th of August, 1840, and on the same day the justice issued his warrant, directed to Daniel G. Holmes, one of the proprietors, to call a meeting of the same at the time and place and for the purposes mentioned in the application; which being held at the time and place specified, namely, on the 20th of August, 1840, (the justice presiding until a clerk was chosen and qualified) the

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corporation was regularly organized, and votes were passed confirming all the previous records and proceedings, and authorizing Nathaniel Thurston, their agent and treasurer, to procure the loan above mentioned from the Lowell Institution for Savings, and to execute the mortgage and note aforesaid therefor.

To this evidence the demandant objected on various grounds, and among others, that there was no legal or competent evidence, that the persons, who applied to the justice to issue his warrant, were members of the corporation; that the proprietors had no legal authority to divide their meeting-house into shares, or issue certificates of stock thereon; that holders of such shares did not thereby become members of the corporation; that the justice had no authority to call such meeting, and no meeting could legally be held under his warrant; and that there was no evidence that the exigency existed authorizing the justice to issue his warrant.

The six signers of the application for the meeting of the 20th of August, 1840, were Nathaniel Thurston, Ira Caverly, Cummings Paris, Daniel G. Holmes, Joseph W. Thurston, and Henry C. Magoun; the first three of whom, it was conceded, were qualified voters.

Daniel G. Holmes, in August, 1836, was appointed one of the committee to purchase land; in August, 1837, he was chosen secretary of the society; his name was on the stock book; and in February, 1838, a certificate of one fourth of a share appeared to have been issued to him. But whether he was the owner of any other fractional parts of a share did not appear from the books, although there were such fractional parts.

Joseph W. Thurston was a member of the firm of Thurston, Latham and company, who were original subscribers, in that form, for one share of the stock. Thurston, having acquired the rights of his copartners, became the proprietor of this share in 1839.

Henry C. Magoun appeared to have been a signer of the original stock book, and to have paid for a share, although no certificate was to be found of it. He had also acted as a proprietor.

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All these persons, except Paris, and ten or fifteen other members, were present at the meeting, and took a part in the proceedings as members, on the 20th of August, 1840.

S. Bartlett and *P. W. Chandler*, for the defendant, cited *Grays* v. *Turnpike Company*, 4 Rand. 572, 582; *Wood* v. *Cushing*, 6 Met. 448.

T. Hopkinson and *B. F. Butler*, for the plaintiff, contended that mere ownership of stock could not make one a member of a religious society, but that his consent in writing must be shown; Rev. Sts. *c.* 20, § 4; and that the exigency required by Rev. Sts. *c.* 20, § 17, for calling a meeting by a justice of the peace, must not only exist, but must appear on the face of the application and of the warrant. *Sudbury* v. *Stearns*, 21 Pick. 148; *Bridge* v. *Ford*, 4 Mass. 641.

Dewey, J. The original organization of "the Freewill Baptist Church in Lowell" must, as between these parties, be held to have duly taken place, so far as the acceptance of the charter, and the actual creation of a body politic, are concerned. Both parties have so treated the association, and upon the facts properly so treated it. The nature of this corporation, and its distinctive character, are also well settled. Notwithstanding the various acts of the association, which were of a character unusual for a merely religious society, yet, upon a full consideration of the subject, this court decided in the case of *Wiggin* v. *Freewill Baptist Church in Lowell*, 8 Met. 301, that it was a religious society, under a charter conferring no other privileges, but subject to the statutes regulating religious societies.

In this aspect of the case, the only question seems to be, whether the meeting of the society held on the 20th of August, 1840, was a legal meeting. This society had conducted their affairs without any by-laws directing the manner of calling meetings; nor do they appear to have had any assessors or standing committee competent to call meetings. They were therefore within the cases provided for by the Rev. Sts. *c.* 20, § 17, and §§ 26, 27.

The defendants contend, that a proper and legal application was made by five or more of the qualified voters of

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the society to a justice of the peace, requesting him to call a meeting of the society on the 20th of August, 1840. Of the signers of this application, three at least are conceded to have been qualified voters of the society, namely, Nathaniel Thurston, Ira Caverly, and Cummings Paris. These were shareholders, and members of the corporation, if there were any members.

The fourth signer is Daniel G. Holmes, whose name appears on the stock book of the society. In August, 1836, he was appointed one of the committee to purchase land. In August, 1837, he was chosen secretary of the society; and a certificate of one fourth of a share appears on the books to have been issued to him in February, 1838; but whether he was the owner of other fractional parts of a share does not appear from the books; although it does appear that there were fractional shares.

Joseph W. Thurston, the fifth signer, became interested in this society as a member, by an original subscription in the name of "Thurston, Latham and company," and by eventually succeeding to the rights of his copartners. Whether the original copartners would all of them have become members of the society, and what their rights as voters would have been, had they all claimed severally to exercise that right, we need not now inquire, Thurston, as early as 1839, having become sole owner of the share; and ownership of shares in this property seems to have been the mode of becoming members of the society, as it is in many similar societies in our large towns and cities.

Henry C. Magoun, the sixth signer, was shown by the evidence to have been a signer on the original stock book. He appears from the evidence to have acted as one of the proprietors at meetings held before August, 1840, and also to have paid for a share, although no certificate is now to be found of it.

As corroborative evidence, we have the testimony of a witness, that all these persons, except Paris, were present at the meeting on the 20th of August, 1840, as such members.

We think that this evidence would well authorize a jury to

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find, that the application for this meeting was signed by five of the qualified voters of the society, and that in this respect the meeting was regularly called.

The other material facts, the want of assessors and parish committee, are also fully shown to have existed. This justified the calling of a meeting under the provisions of the Rev. Sts. *c.* 20, § 17, before cited; and we see no valid objection to the warrant in the form in which it was issued.

The result is, therefore, that this meeting was legally called; it was attended by more than ten members, thus showing that there were ten or more qualified voters or persons answering to that description present, and allowed by those who were regular members to be treated as legal members; and at this meeting authority was given to execute the conveyance, under which the tenants claim.

Judgment for the tenants.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF BRISTOL, PLYMOUTH, BARNSTABLE AND DUKES COUNTY, OCTOBER TERM 1849, AT PLYMOUTH.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE, }
HON. CHARLES A. DEWEY, } JUSTICES.
HON. RICHARD FLETCHER, }

JOHN CRAIN *vs.* LUTHER PAINE.

4c 483
161 324
4c 483
163 525

A mortgagee of personal property may make an equitable assignment of his mortgage, which courts of law will take notice of and protect, by a delivery of the deed and note to the assignee, without writing, for a valuable consideration.

An equitable assignee of a mortgage of personal property may maintain an action of trover for the conversion of such property, in the name of the assignor.

If a note, secured by a mortgage of personal property, becomes barred by the statute of limitations, the mortgagee's title to the property is not thereby defeated.

THIS was an action of trover, to recover the value of a small dwelling-house, and was tried before *Fletcher*, J., by whom it was reported for the consideration of the whole court.

On the 2d of September, 1833, one Alden Sibley, being then the owner of the building in question, which stood

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upon land leased of one Oliver Starkweather, sold and conveyed the same to the defendant, who thereupon mortgaged it back to him, to secure the payment of a note of that date for the sum of $200, payable on demand. In October following, Sibley gave the note and mortgage, without any written assignment, to one Gardner Reckard, as security for a debt of $200; and in December, 1846, Reckard delivered the note and mortgage to the plaintiff; at whose request, and without any additional consideration, Sibley then made a written assignment of the mortgage to the plaintiff. After this conveyance, the mortgage, of which no record had been previously made, and the assignment, were both recorded.

It was in evidence for the plaintiff, that he had taken the necessary steps to foreclose the mortgage, and that after the expiration of the statutory term of sixty days, and before the commencement of this action, he made a demand upon the defendant to deliver him possession of the building, which the defendant refused to do. It was admitted that the building, at the time of the demand and of the service of the writ, was in possession of the defendant. But no request or demand, for the payment of the note, for which the mortgage was given, was proved to have been made, unless the foreclosure of the mortgage operated as such.

It was in evidence for the defendant, that on the 25th of January, 1834, Alden Sibley, the original mortgagee, assigned all his property of every description, for the benefit of his creditors; that the assignees settled the estate of the assignor, and paid out the proceeds thereof, in conformity with the provisions of the deed of assignment; and that in the year 1837, the defendant became the owner in fee of the and on which the building stood, by a conveyance from the heirs or devisees of Oliver Starkweather. Upon this evidence, a verdict was taken by consent for the plaintiff, for the value of the building; subject to the opinion of the court, as to whether the plaintiff is or is not entitled to recover in this action.

J. H. Clifford, for the defendant.

T. D. Eliot, for the plaintiff.

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WILDE, J. This is an action of trover, for the conversion of a small building; and the question is, whether upon the facts reported, the plaintiff has proved a valid title to the property.

The building, in September, 1833, was the property of one Alden Sibley, and was by him then sold to the defendant, who thereupon mortgaged it back as security for the payment of a certain note of hand to him, for $200, which was then due. In December, 1846, this mortgage was assigned in writing, by Sibley, to the plaintiff, whereby he acquired a legal title to the property mortgaged, provided Sibley had a right to make the assignment. The counsel for the defendant contends that he had not, and it was proved, that, in January, 1834, Sibley made a general assignment of all his property to certain assignees, in trust, for the benefit of his creditors. But it was also proved, that before that assignment, Sibley had delivered the note and mortgage to one Reckard, as security for a debt of $200; that the note and mortgage were afterwards by him delivered over to the plaintiff; and that Sibley, thereupon, without any new consideration, made a written assignment of the mortgage, as before stated, to the plaintiff.

Upon these facts, the question is, whether the delivery of the note and mortgage to Reckard, as security for a debt, without an assignment in writing, is to be considered as an equitable assignment, which is entitled to protection in a court of law. It has been long well settled, that if a note of hand is transferred by delivery, *bona fide*, and for a valuable consideration, this is a valid assignment in equity, which courts of law will regard and protect, although the assignee cannot maintain an action at law thereon in his own name. And the same principle applies to other choses in action. An equitable interest in a judgment may be assigned for a valuable consideration, by the delivery of the execution thereon to the assignee. *Jones* v. *Witter*, 13 Mass. 304; *Prescott* v. *Hull*, 17 Johns. 284; *Henry* v. *Brown*, 19 Johns. 95; *Ford* v. *Stuart*, 19 Johns. 342; *Dunn* v. *Snell*, 15 Mass. 481. The same principle applies also to the mortgage, which was

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delivered with the note as security. Indeed, if the mortgage had not been delivered with the note, the assignment of the note would, according to the doctrine held by courts of equity, draw after it the mortgaged property as a consequence. It was so held in *Martin* v. *Mowlin*, 2 Bur. 969, 978, by lord Mansfield, who also held the same principle to be applicable to mortgages of real estate, notwithstanding the statute of frauds. And so it was held in the case of *Green* v. *Hart*, 1 Johns. 580. The leading case on this point is that of *Russel* v. *Russel*, 1 Bro. C. C. 269. And this decision, Powell, in his treatise on the law of mortgages, says, "had met with universal disapprobation, because (according to the language of lord Eldon) it was a virtual repeal of the statute; nevertheless, it had been always acted on, and each succeeding case had added stability to a decree, which it had previously pronounced to be settled on spurious principles." And it has been frequently decided by this court, that such an equitable assignment of a mortgage of real estate is not valid by our statutes, relating to the conveyance and transfer of real estates. But these decisions are confined to mortgages of real estates; and in *Parsons* v. *Welles*, 17 Mass. 419, the distinction is alluded to between mortgages of real and personal property, and the English doctrine as to the latter is impliedly if not expressly admitted.

But in this case, it is not necessary to decide, that the assignment of the mortgage debt would draw after it an equitable assignment of the mortgage; for the mortgage deed and the note were both deposited with Reckard for the same purpose, namely, to secure the payment of the debt; and this deposit amounts, according to all the authorities, to an equitable assignment of the note and mortgage. 3 Pow. Mortg. 1059, Rand's ed.; *Jones* v. *Gibbons*, 9 Ves. 407, 411; *Martin* v. *Mowlin*, 2 Bur. 969; *Green* v. *Hart*, 1 Johns. 580; *Parsons* v. *Welles*, 17 Mass. 419.

By the laws of Massachusetts, such a deposit or delivery would not amount to an assignment of a mortgage of real estate; but the objections to such an assignment do not apply to mortgages of personal property. It appears by the

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cases already cited, that the delivery of a note of hand, or other chose in action, to an assignee, for a valuable consideration, without an assignment in writing, is a valid assignment in equity, which courts of law will take notice of and protect. And the assignment of a mortgage of personal property by delivery stands on the same footing, and is entitled to the same protection. By such an assignment, however, the legal estate did not pass to the plaintiff, and this action could not be maintained in his own name, before the assignment in writing; yet he might maintain an action for the conversion of the property so equitably assigned in the name of Sibley, which action Sibley would have had no right to discharge.

Nor did the title to the mortgaged property pass by the general assignment of Sibley's property for the benefit of his creditors; and it is manifest, that it was never intended to pass thereby; for the assignees have settled that concern, and paid over the proceeds of the property assigned, without claiming the mortgaged property, nor do they now claim it.

We are therefore of opinion, that the legal title to the mortgaged property remained in Sibley until he conveyed it to the plaintiff, who had before acquired the equitable title thereto from Reckard.

It was argued by the defendant's counsel, that the note has been barred by the statute of limitations; but this clearly cannot defeat the plaintiff's title to the mortgage property, so as to bar the present action.

Judgment for the plaintiff on the verdict.

ANSELM BASSETT *vs.* CHARLES PORTER.

4c 487
178 100

It is not erroneous in a judge, in the trial of a cause, to refuse to rule, at the request of the defendant, that upon the evidence introduced by the plaintiff, the defendant is entitled to a verdict.

Where there is no record of the establishment of school districts in a town, parol evidence is admissible, to show that the inhabitants of such town, living within

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certain specified limits, have been known and recognized, and have acted, in all respects, as a school district, for many years; and from such evidence, a jury may infer that such district had a legal origin and was legally established, provided the whole town was, in like manner, laid out into districts by territorial or geographical divisions.

The provision of the Rev. Sts. *c.* 7. § 44, exempting assessors from all responsibility, except "only for the want of integrity and fidelity on their own part," does not extend to the assessment of a school district tax, where the district has no legal existence.

A collector of taxes, under a warrant from the assessors, in which the time for the completion of the collection of the taxes therein mentioned is specified, may arrest a person for the non-payment of his tax, after the expiration of the time limited in the warrant.

This was an action of trespass, for an assault and false imprisonment, tried before *Bigelow*, J., in the court of common pleas. The plaintiff, being an inhabitant of Taunton, and having been assessed the sum of $13·25 in school district number one therein, which tax he refused to pay, was arrested and imprisoned by the collector of Taunton, upon a warrant issued by the defendant and two others, as assessors of that town. The defendant justified as an assessor of Taunton.

The warrant was dated the 8th of August, 1845, and directed the collector to complete and make up the account of his collection of the whole sum therein mentioned, and to retain the same in his own hands as treasurer of Taunton, subject to the order of the building committee of school district number one, or to transmit and pay over the same to his successor in office, on or before the 20th of October following. The arrest of the plaintiff, for which the action was brought, did not take place until several months after the said 20th of October.

The plaintiff, having shown the warrant signed by the defendant, and having proved the arrest and imprison nent under it, there rested his case; whereupon the defe dant asked the court to rule, that on this evidence the defe dant was entitled to a verdict. To this the judge replied, that if the defendant intended to rest his defence there, the court would give such instructions to the jury, as might be proper: but the defendant declined to rest his case upon the plaintiff's evidence, and proceeded to introduce evidence in defence.

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The defendant, having given evidence of his election and qualification as an assessor of Taunton, for the year 1845; of the vote to raise money for building a school-house by the school district; and of the assessment of the same upon the inhabitants of the district, including the plaintiff, by the assessors of Taunton; then offered evidence to prove the legal existence of school district number one in that town.

For this purpose, the defendant introduced evidence, in the first place, that a small portion of the records of Taunton were destroyed by fire in the year 1838, and that in the remaining books of record, there was no record of the laying out of any school district in that town, or any division thereof whatever into school districts, prior to August, 1845; but there was no evidence that any of the records destroyed by fire contained any record of the laying out or limits of district number one, or of any other school district.

The defendant then offered to show, by parol, that there was and had been for many years, by reputation and user, a school district number one in Taunton, known, recognized and acting as such, in all respects; and for this purpose, he offered to prove, that certain families and persons residing in Taunton had always been considered and had acted as being within such district number one; that these families and persons resided within certain limits in said town; and that the lines of district number one were run out by a committee of the town, in August, 1845, in conformity with those limits, and included said families; but the defendant did not offer to prove, that, prior to August, 1845, there had ever been, otherwise than is above stated, any geographical laying out or defining of the limits of the said school district number one. The evidence was rejected.

It appeared from the town records, that, in June, 1845, after the district had voted to raise money as aforesaid, but before the tax was assessed, the town, in pursuance of a request of the district, to the selectmen, in May, 1845, appointed a committee to run out and define the limits of said school district number one, and that the committee reported their doings to the town on the 10th of August, 1845. This report

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was entered at length on the records of the town, but it did not appear therefrom that it was ever accepted, or what was the action of the town upon it. The defendant offered to show, by parol, that the report was in fact accepted, but accidentally omitted to be recorded by the clerk. The court rejected the evidence.

The defendant further contended, that inasmuch as the arrest of the plaintiff on the warrant did not take place until after the time named therein for the completion of the collection of the tax, the defendant was not liable therefor. But the presiding judge overruled the objection, and instructed the jury, that on the evidence in the case, the defendant had failed in making out his justification, and that the plaintiff was entitled to their verdict.

The jury found a verdict for the plaintiff, for the sum of $16, and the defendant thereupon alleged exceptions to the rulings and instructions above stated.

N. Morton, for the defendant.

1. The presumptions of law are all in favor of the legality of the acts of the defendant as assessor. *Lowell* v. *Flint*, 7 Shep. 401; *Gage* v. *Currier*, 4 Pick. 399; *Baker* v. *Allen*, 21 Pick. 382; *Ingraham* v. *Doggett*, 5 Pick. 451. 2. The existence of the district *de facto* is not denied, and this is enough to protect an assessor acting with fidelity. 3. But if it is incumbent on the defendant to prove a legal district with geographical limits, (*Withington* v. *Eveleth*, 7 Pick. 106,) such limits the defendant offered to prove. 4. The evidence offered for this purpose was competent. *Dillingham* v. *Snow*, 5 Mass. 547; *Stockbridge* v. *W. Stockbridge*, 12 Mass. 400; *New Boston* v. *Dunbarton*, 12 N. H. 409; *Barnes* v. *Barnes*, 6 Verm. 388; *Sherwin* v. *Bugbee*, 16 Verm. 439; *Downer* v. *Dane*, 19 Verm. 338; *Gray* v. *Sheldon*, 8 Verm. 403; *Steele* v. *Prickett*, 2 Stark. R. 463; *Cambridge* v. *Lexington*, 17 Pick. 222, 230; *Pease* v. *Smith*, 24 Pick. 122; *Alden* v. *Rounseville*, 7 Met. 218. 5. So far as the liability of the assessors is concerned, it is immaterial whether there was a legal record or not. Rev. Sts. *c.* 7, § 44; *Saxton* v. *Nimms*, 14 Mass. 315; *Sprague* v. *Bailey*, 19 Pick. 436, 440. 6. An assessor cannot be liable

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for an arrest made by the collector, after the time mentioned in the warrant. Rev. Sts. *c.* 8, § 1.

T. D. Eliot and *H. G. O. Colby*, for the plaintiff.

If the defendant did prove a district *de facto*, he disproved district *de jure*. The evidence offered, to prove the laying out of the district, was only competent, admitting that there had been a geographical laying out of the whole town into districts; but there was no evidence of any such division, and the evidence offered was in its nature secondary. The limitation of time in the warrant was merely directory. Rev. Sts. *c.* 8, § 50, p. 804; *c.* 23, § 37; *Pond* v. *Negus*, 3 Mass. 230; *Torrey* v. *Millbury*, 21 Pick. 64, 67; *Williams* v. *Lunenburg*, 21 Pick. 75, 82; *Collins* v. *Waggoner*, Breese, 143; *Richards* v. *Daggett*, 4 Mass. 534.

Fletcher, J. An exception was taken in the court below, and has been insisted on in this court, that the judge should have ruled as requested, that on the evidence introduced by the plaintiff the defendant was entitled to a verdict.

But surely it was no error in law, that the judge did not express his opinion at any particular time, or at any particular stage of the cause. Whether the presiding judge should have expressed his opinion upon the case, as it stood upon the plaintiff's evidence alone, or whether he should withhold such expression until the evidence on both sides was fully introduced, was a matter wholly within his own discretion. Exception must be taken, if at all, to the opinion itself, and not to the time when it was or was not pronounced.

There being no evidence of any geographical laying out or defining of the limits of school districts in Taunton, previous to August, 1845, the defendant offered to prove by competent evidence, as stated in the bill of exceptions, that in point of fact there was a school district number one in Taunton, known, recognized, and acting as such in all respects; that this district had certain limits, and, of course, was territorial or geographical; and that it had so existed for many years, the exact number of years not being specified, but stated as many years. This evidence was rejected, for reasons which are not stated, and do not appear in the bill of exceptions.

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If the defendant could have proved what he offered evidence to prove, but which was rejected, there would have been nothing wanting to show the legal existence of school district number one, which was the point that the defendant wished to establish, but to satisfy the jury that this district, which existed in fact, had a legal origin. Now, the defendant offered to show, by parol evidence, that there was, and had been for many years, by reputation and user, a school district number one in Taunton, known, recognized, and acting as such in all respects, and with certain limits; and if he could have established these facts by parol, it would most certainly have been competent for the jury to have inferred or presumed from these facts alone, and without any other facts or evidence, that this district had a legal origin, and was therefore a legally established district.

It was by no means necessary to produce a record of the laying out of the district, or any direct and positive evidence of such laying out; the fact that such a district had existed, had been known, recognized, and had acted as such, in all respects, would be ample evidence from which a jury might well infer, or presume, that it had a legal origin, though no direct or positive evidence of its origin could be produced. In truth, the simple fact of the existence, in such a town as Taunton, of a school district, known and acting as such for many years, would lead the mind almost unavoidably and irresistibly to the conclusion, that it must have had a legal origin. The longer its existence could be shown, the stronger would be the presumption that it was originally duly established, and that the direct evidence of its establishment had been lost by time and accident. That it would be perfectly competent and proper for the jury to make such presumption, there can be no doubt. Such presumption would be warranted by one of the most familiar and well-settled principles of the law of evidence. It is a matter of every day's practice, that a long-continued possession furnishes ground of presumption, that such possession was rightfully commenced, and thus a legal title is established to land, or to an easement upon land, though no grant or deed is shown, and no positive evidence of such grant or deed is introduced.

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Deeds and even records may be presumed to exist, or to have existed, without any direct proof of their existence. Indeed, it may perhaps be maintained, that there cannot be any matter of fact, which a jury may not presume from other facts and circumstances. It is in truth but the exercise of sound reason, in inferring from facts which are shown, the existence of other facts which are not directly shown. The proof of certain facts, in a chain of events, leads directly and forcibly to the conclusion of the existence of the facts, which naturally and properly and usually precede those which are known and established.

Applying this principle of presumption to the present case, it is quite manifest, that the court below erred in rejecting the parol evidence to show the long existence, in fact, of district number one in Taunton. If it had appeared, that such district had acted, and had been known and recognized, for a long course of years, as an established district, it would certainly have afforded a ground of probable if not even of violent presumption, that it had a legal origin, and of course that district number one in Taunton was a legally established district, which was the matter in question.

It was by no means indispensable, that a record of the laying out should be produced. The record might be lost or it might be that there was an omission to record the laying out, though legally and properly made. The laying out might have originally appeared by reports of committees and papers kept on file, which, with votes accompanying them, had been lost by time and accident, and which were of too early a date to be then in the recollection of any living man.

But whatever might have been the finding of the jury, under all the circumstances of the case, and in view of all the evidence which might have been produced, the evidence offered was proper for their consideration, and should have been admitted.

It will be incumbent on the defendant to establish, not only that there is a territorial district number one, but he must go further and prove, that the whole town is laid out into territorial districts. It is not competent for the town to make a

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single district, but if there be any districting, the whole town must be districted. The districts must be territorial, and so laid out as to embrace the whole town.

If there were no district number one, then the defendant would not be protected by the Rev. Sts. *c.* 7, § 44, which protects assessors acting with integrity and fidelity. It must be established, that there was a district, or the defendant cannot be protected by the statute. If there be no district, then the defendant had no right to act at all, and would not therefore be protected, as an officer acting with integrity and fidelity; though he was but one of several assessors, yet he is liable alone, if liable at all.

The ground taken, that the arrest was unlawful, because made after the time specified in the warrant for the payment of the money, cannot be sustained. The arrest was made within a year, and there is no law prohibiting the arrest at that time. There was nothing to restrain the execution of the warrant after the time at which the collection and payment of the money was required to be made. The verdict must be set aside, and a new trial had in the court of common pleas.

Daniel L. Fisher & another *vs.* The Inhabitants of School District No. 17 in Attleborough.

4c 494
161 309
4c 494
171 174

Where a school district appointed three persons a committee to build a school-house, two of whom, the third refusing to act, built a house, where all the schools of the district were afterwards kept, and all meetings of the inhabitants of the district held, and on which the notices of such meetings by vote of the district were posted; it was held, that on these facts a jury were warranted in finding such a ratification and acceptance by the district of the doings of the two acting members of the committee, as would render the district liable to pay them for the house.

This was an action of assumpsit, to recover a balance alleged to be due to the plaintiffs for building a school-house, and was tried before *Bigelow*, J., in the court of common pleas.

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On the trial it was in evidence for the plaintiffs, that in November, 1845, the district voted to build a school-house, and appointed the plaintiffs and one Drake a committee for the purpose, and that Drake was called upon by the plaintiffs to join them in building the school-house before the same was commenced, but refused to act at all in the matter.

The plaintiffs offered evidence tending to show, that the school-house was erected by them and completed in August, 1846; that all the schools of the district had ever since been kept there; that all the meetings of the inhabitants of the district, for the transaction of the business of the district, had been held therein, and that the notices to warn meetings of the district had all been posted on the school-house, in compliance with a vote of the district; and that there was no other school-house in the district.

It appeared that the land on which the school-house was erected did not belong to the district, but there was evidence tending to show a negotiation in behalf of the district for the hire or purchase of the same.

Upon this evidence, the defendants asked the judge to rule, that as a committee of three were chosen to build the school-house, and two of them only acted, the other refusing to act, all the acts of the two in the premises were unauthorized, and the district were not bound thereby. But the judge refused so to rule, and instructed the jury, among other things, that if they were satisfied that the plaintiffs erected the school-house, it was competent for them to infer a request, on the part of the defendants, of the plaintiffs to erect the house, and a promise to pay the plaintiffs a fair and reasonable sum for the labor done and materials furnished for the erection thereof, from the acts and doings of the district in relation thereto, subsequent to its erection; and if the district had taken possession of the house, and used, occupied, and improved it for their schools and for meetings of the inhabitants of the district, for the transaction of business, and for other lawful purposes, so as to indicate clearly to their minds an appropriation and adoption of the house by the district as their own, for such uses and purposes as were fairly within

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the corporate power of the defendants, then it was for the jury to say whether this state of facts satisfied them, that the plaintiffs had built the school-house at the defendants' request, and if they were satisfied of such request, that the plaintiffs had a right to recover such a sum as would be a fair and reasonable compensation to them for the labor done and materials furnished in the erection of the house.

The jury found a verdict for the plaintiffs, and the defendants alleged exceptions.

N. Morton, for the defendants.

H. Pratt, for the plaintiffs.

Fletcher, J. This is an action of assumpsit, to recover a balance alleged to be due to the plaintiffs for building a school-house. It appeared in evidence, that the plaintiffs and one other person had been appointed a committee to build a school-house; that such other person refused to act; and that the plaintiffs went on without him and built the school-house, payment for which is sought to be recovered in this suit. It was objected, on the part of the defendants that three persons having been appointed to build the house, two of them could not lawfully execute the powers given to the three, and that the plaintiffs could not recover in this suit. But it is not necessary to settle this question, in the present position of the case.

Assuming that the defendants are right in their objection, that the power given by the district to three could not be legally executed by two only, so as to bind the district simply upon the vote of the district giving authority to the three to build the school-house; yet the district might afterwards ratify the proceedings of the two in building the house and accept the house thus built; and if the district did so ratify the acts of the two, and did so accept the house when built by the two, they would be bound to pay for it. And the evidence introduced by the plaintiffs, as to the acts of the district, was competent and sufficient to prove such a ratification and acceptance, as would render the district liable to make payment for the house, as demanded by the plaintiffs.

The instruction of the court below, to which exception was

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taken by the defendants, was in substance and effect, though not exactly so in form, that if the jury should find upon the evidence, which was competent and sufficient for the purpose, that the district had so ratified the acts and doings of the plaintiffs in building the house, and had in fact accepted the house when built, then they would be warranted in finding for the plaintiffs. And the jury accordingly so found. The instruction, therefore, of the court below, and the finding by the jury, being well warranted by the facts in the case, the exceptions must be overruled, and judgment entered on the verdict.

GUERDON WATERMAN *vs.* LORING J. MEIGS & another.

4c 497
159 456
4c 497
165 332

An agreement for the delivery of a quantity of planks for ship-building, at a future time, and at a specified price, is a contract for the sale of goods, within the statute of frauds.

A letter from the purchaser to the vendor, alluding to a parol agreement for the sale of goods, and inquiring whether they will be ready at the time agreed upon, but not mentioning the quantity, quality, or price of the goods, or the time of payment, is not a sufficient memorandum to take the agreement out of the statute of frauds.

THIS was an action on the case, in which the plaintiff declared that the defendants, at New Bedford, on the 1st day of May, 1848, in consideration that the plaintiff, at their request, had bargained and sold to them five thousand feet of plank, at the price of $127·50 a thousand, and had undertaken to deliver the same plank to them at Rochester, then and there promised the plaintiff to accept said plank, and to pay him therefor the price aforesaid; and that the plaintiff afterwards, on the 9th day of June, 1848, was at Rochester, with the plank, ready and willing, and offered, to deliver the same to the defendants, &c., &c.

At the trial before *Bigelow*, J., in the court of common pleas, it was admitted, that the defendants were in partnership in the business of ship-building; and the plaintiff introduced evidence of verbal declarations and statements made by the defendant Meigs in May, 1848, that he had bought of

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the plaintiff five thousand feet of plank at $127·50 a thousand, to be delivered at Mattapoisett, in the town of Rochester. It also appeared that the plaintiff had the alleged quantity of plank at Mattapoisett, on the 9th of June, 1848, and offered to deliver it to Meigs, who refused to receive the plank, denying that he had purchased the same. The plaintiff also proved, that the defendants commenced a suit against him, at the last term of the court of common pleas for the county of Plymouth, but it did not appear for what such suit was brought, further than that a witness testified, that Meigs told him, "that he had contracted with Waterman to deliver him a lot of plank, but it did not arrive in time, and he rejected it on that account; that the plaintiff threatened to make difficulty about it and sue them, but he meant to get the weather gage of plaintiff, and had sued him."

The plaintiff then gave in evidence a letter addressed to him, dated May 18th, 1848, and signed by the defendant Meigs alone, of which the following is a copy: "Sir, having been expecting for some time the plank I bought of you when at Norwich, and not receiving, or hearing from them or you, I take the trouble to write you respecting them, as we shall be ready to use them in all next week; please write immediately, and let me know if you can deliver them by the middle of next week. Do not delay an answer one moment, as we shall positively want them and have to quit, unless they come to hand next week. Send me the plank I bought, a good lot, (extra as the price.) Yours, in haste."

The defendants contended, on this evidence, that there was no sufficient memorandum, or note in writing, of the contract relied on by the plaintiff, to take it out of the operation of the statute of frauds (Rev. Sts. c. 74, § 4); and the judge being of the opinion, that as there was no evidence of any acceptance or reception of the plank, or of any part of it, by the defendants, or of any thing being given in earnest, or in part payment, and that the letter offered by the plaintiff was not such a note or memorandum in writing as would take the case out of the operation of the statute, instructed the jury that on this evidence the plaintiff could not recover.

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The jury thereupon returned a verdict for the defendants, and the plaintiff alleged exceptions.

T. G. Coffin, for the plaintiff. 1. The case is not within the statute. The contract to transport and deliver was executory; something remained to be done. *Cooper* v. *Elston*, 7 T. R. 14; *Rondeau* v. *Wyatt*, 2 H. Bl. 63; *Mixer* v. *Howarth*, 21 Pick. 205; *Kent* v. *Kent*, 18 Pick. 569. 2. The letter is a sufficient memorandum to take the case out of the statute. *Whitwell* v. *Wyer*, 11 Mass. 6; *Bradford* v. *Manley*, 13 Mass. 139; *Penniman* v. *Hartshorn*, 13 Mass. 87; *Gale* v. *Nixon*, 6 Cow. 445.

J. H. Clifford, for the defendants.

By the court. The question, whether a contract is a contract to sell, or to make and deliver, is often a very difficult one to determine. See *Lamb* v. *Crafts*, 12 Met. 353, 356, and cases there cited. But the agreement in this case was clearly a contract to sell, within the statute. Such being the nature of the contract, is the paper relied on a sufficient memorandum to take the case out of the statute? No objection is made to its being signed by only one partner, it being a partnership concern. The statute requires "some note or memorandum in writing of the bargain." This letter alludes to plank bought, and to be delivered; but it does not state any one of the elements of a contract, price, quantity, quality, time, place, or any thing to inform us what the nature of the contract was; and is clearly not a sufficient memorandum. The case of *Morton* v. *Dean*, 13 Met. 385, in which the memorandum relied on was held not to be sufficient, was a stronger case for the plaintiffs than the present.

Exceptions overruled.

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DWELLY GOWARD *vs.* BERNARD P. DUNBAR & another.

Where a defendant specifies, among other grounds of defence, a discharge in bankruptcy, the court is bound, under *St.* 1843, *c.* 55, which provides that when an action is discontinued or the plaintiff nonsuited solely in consequence of a plea of bankruptcy, the defendant shall recover no costs against the plaintiff, either to allow the plaintiff to discontinue solely on the ground of the discharge in bankruptcy, or to require the defendant, if he insists on going to trial, to waive his discharge and proceed on his other grounds of defence.

THIS was an action of assumpsit on a promissory note for $100, dated June 26th, 1841, payable to the plaintiff or order on demand with interest, and signed by the defendants, Bernard P. and Peter E. Dunbar. The writ was dated June 19th, 1847, and returnable to the next term of the court of common pleas for the county of Bristol.

Bernard P. Dunbar, on the 5th of November, 1847, filed a specification of defence, setting forth as grounds of defence, 1st. A discharge under the bankrupt law of the United States, dated October 11th, 1843, from all debts due June 7th, 1842; 2d. A discharge under the insolvent laws of this state, dated June 10th, 1845, from all debts due previous to November 15th, 1844; 3d. Payment, and accord and satisfaction.

The action was continued until the March term, 1849, when an agreement, signed by the plaintiff and by Peter E. Dunbar, dated March 7th, 1849, that an entry of neither party should be made in the action at the approaching term, was produced and filed in the case.

At the same term, Bernard P. Dunbar, by leave of court, filed an additional specification of defence, setting forth, 1st. That since the commencement of the action the note declared on had been discharged, and the defendant discharged from the action; 2d. Payment; 3d. Accord and satisfaction; 4th. The settlement made between the plaintiff and Peter E. Dunbar, as a payment and discharge. And the action was then continued.

At the June term, 1849, the plaintiff filed a motion for leave to discontinue against Bernard P. Dunbar, solely on

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account of his pleas of discharge in bankruptcy and insolvency. But the court refused to allow the motion, for several reasons, and among others, on the ground that it had not been made in season. The plaintiff also moved that the specifications of bankruptcy and insolvency should be stricken out, and that the case should go to trial on the other grounds of defence. This motion was denied.

The case came on for trial before *Bigelow*, J., at the September term, 1849, when the plaintiff moved that the defendant should elect upon which discharge, whether in bankruptcy or insolvency, he would rely; but the judge overruled this motion. Upon the trial, the plaintiff put in and relied on his note. The defendant then put in his discharge under the bankrupt law of the United States, the validity of which was not disputed. The plaintiff contended, that the settlement with Peter E. Dunbar was evidence from which the jury might infer, that the action was settled between the plaintiff and Bernard P. Dunbar, and thus constituted a bar to the recovery, by the defendant, of a verdict against the plaintiff. But the judge instructed the jury, that upon the evidence, the defendant was entitled to a verdict. The jury accordingly returned a verdict for the defendant, and the plaintiff excepted.

N. Morton, for the plaintiff.

H. Pratt, for the defendant.

Fletcher, J. This case comes before the court by exceptions from the court of common pleas. At the June term, 1849, the plaintiff filed a motion in that court for leave to discontinue against Bernard P. Dunbar, solely on account of his pleas of bankruptcy and insolvency. The court refused to allow the motion, on the ground that the same had not been made in season, and for other reasons. The only reason disclosed, and of which notice can be taken by the court, for refusing to allow the plaintiff to discontinue, is, that the motion was not made in season. But the case surely discloses no such delay, on the part of the plaintiff, as would deprive him of his legal right. The action remained good against Peter E. Dunbar, and was therefore properly con-

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tinued, notwithstanding the discharges set up by Bernard P. Dunbar. Shortly after the action was settled with Peter, the plaintiff moved to discontinue as to Bernard, and it does not appear, that any measure was taken or any desire expressed, on the part of the defendant, for any early action on the part of the plaintiff. The simple question, therefore, is, whether the plaintiff had a legal right to discontinue solely on the ground of the discharges set up by the defendant. The *St.* of 1843, *c.* 55, provides, that "In all civil actions, in which the bankruptcy of the defendant shall be pleaded, and such action shall be discontinued, or the plaintiff nonsuited, solely in consequence of such plea, the defendant shall recover no costs against the plaintiff." The subsequent statute of 1848, *c.* 267, provides, that "Whenever the defence is made to rest on a discharge in bankruptcy or insolvency alone, and an issue is made up in writing to that effect, and found for the defendant, he shall recover his costs from and after such joinder of issue." By the statute of 1843, the plaintiff had a legal right to discontinue. It is said that a discontinuance is always a matter for the discretion of the court. But it was not a matter of discretion under the circumstances of this case. The language of the statute very clearly implies a right to discontinue.

It is said, that the defendant had other grounds of defence than that of his discharge. But he put his defence solely on the ground of his discharge under the bankrupt law of the United States. The defendant might have waived his defence on the ground of his discharge, and put himself on other grounds, and thereby have taken his case out of the operation of the statute. The plaintiff moved the court, that the defendant might be required to waive his defence on the ground of his discharge, and to rely on his other grounds of defence, if he insisted on going to trial, and the plaintiff was not permitted to discontinue. But the court refused this motion.

The court should either have allowed the plaintiff to discontinue solely on the ground of the discharge, or if the defendant insisted on going to trial, he should have been

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required to waive his discharge, and to proceed on his other grounds of defence.

It is said, that the plaintiff should have taken exceptions to the ruling, and not have gone to the jury. But he had no option. He was not allowed to discontinue, and was obliged to go to the jury; which cannot now preclude him from maintaining his exceptions.

Verdict to be set aside, and plaintiff to have leave to discontinue.

ALSON GILMORE *vs.* GEORGE W. SKIFF.

The right of a turnpike corporation, established since the *St.* 1804, *c.* 125, and before the revised statutes, to maintain an action for a penalty in the name of their treasurer, against any person passing a turnpike gate of such corporation without paying toll, is taken away by the revised statutes, *c.* 39, §§ 32, 94, and *c.* 133, § 14.

THIS was an action on the case commenced August 31st, 1848, by the plaintiff as treasurer of the Taunton and South Boston turnpike corporation, to recover three several penalties, under the thirty-second section of the thirty-ninth chapter of the revised statutes, of the defendant, for passing the toll gates of said corporation in Easton and Raynham, contrary to the provisions of the statute. The company were incorporated by the legislature on the 24th of June, 1806, (*St.* 1806, *c.* 7,) with all the powers, privileges and advantages, and under all the restrictions, expressed in the statute of 1804, *c.* 125; the fifth section of which imposed a penalty on any person who should forcibly pass, or attempt to pass, any turnpike gate on any turnpike road legally established, without having first paid the legal toll, with an intent to avoid the same, to be recovered by the treasurer of the corporation to their use, in an action of trespass.

At the trial before *Bigelow*, J., in the court of common pleas, the defendant objected, that the action could not be maintained by the treasurer of the company, but that the forfeiture provided for in the section of the revised statutes,

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on which the action was brought, could only be recovered by indictment or complaint. The judge ruled, that the plaintiff could not maintain the action, and a verdict was rendered for the defendant, whereupon the plaintiff excepted.

H. G. O. Colby and *H. Pratt*, for the plaintiff. 1. The charter granted to the turnpike corporation in 1806 was a contract between them and the government, and the legislature could not afterwards take away the right thereby given to them to recover penalties in the name of their treasurer. This right was a vested right. *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 344; *Nichols* v. *Bertram*, 3 Pick. 342; *Harrington* v. *Berkshire*, 22 Pick. 263; *Van Rensselaer* v. *Albany*, 1 Cow. 501. The Rev. Sts. *c.* 39, §§ 32, 94, only changed the form of action from trespass to case. 2. The general provision of Rev. Sts. *c.* 133, § 14, does not repeal the old act. And see the saving clause in Rev. Sts. *c.* 146, § 5.

N. Morton, for the defendant. The Rev. Sts. *c.* 133, § 14, give the penalty to the commonwealth, where there is no express appropriation. The striking out by the legislature of the words, "to be recovered to the use of the corporation in an action by the treasurer thereof," in the report of the commissioners, *c.* 39, § 35, is quite significant. And see *Sturbridge* v. *Winslow*, 21 Pick. 83, 88; *St.* 1842, *c.* 66.

The court overruled the exceptions.

Charles C. Field *vs.* Willard Snell.

The grantor of land with warranty is a competent witness for the grantee, in a real action against him to recover the land, upon being released by the grantee from all liability on his covenants; the grantee not having previously conveyed or incumbered the estate.

This was a writ of entry, for the recovery of a piece of land in North Bridgewater, to which the tenant pleaded *nul. disseizin* as to all the demanded premises northerly of a certain line running east seventeen and a half degrees north, and a disclaimer of all the premises south of that line.

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At the trial, before *Fletcher*, J., in this court, it appeared, that prior to August, 1826, one Forbes Field had for twenty-six years owned the land on the northerly side of the true line, and Daniel Field, on the southerly side; that the demandant held through certain mesne conveyances the estate of Daniel Field, and the tenant that of Forbes Field; and that the demandant claimed by a line running east nineteen degrees and thirty-five minutes north.

The tenant, in support of his title, gave in evidence the will of Forbes Field, in which he devised his land to Daniel Field, Jr., and George Field, as tenants in common; a deed by Daniel Field of his undivided half to one Churchill; a deed of the same by Churchill to one William Ames; a division by mutual releases between William Ames and George Field, by which Ames became seized in severalty of all the land which was affected by the said line; a deed by William Ames of his said land to one William C. Leonard; and a deed of warranty of the same premises from William C. Leonard to the tenant, by which the land was described as bounded southerly by the said line running east seventeen and a half degrees north.

The tenant, in order to prove that the true boundary line ran east seventeen and a half degrees north, called William C. Leonard, as a witness. The demandant objected to the admissibility of the witness, on the ground that he was interested in the event of the suit, in consequence of his having conveyed the land, by the line aforesaid, with a covenant of warranty. It was then proved by the tenant, that he had released the witness from all the covenants contained in his deed of warranty to the tenant; that the release had been duly acknowledged and recorded in the registry of deeds, with a note of reference to the record of Leonard's deed; that the tenant had never made any conveyance of the land, or created any incumbrance thereon; and that the same was free from all incumbrances whatever.

The judge thereupon admitted Leonard as a competent witness, and a verdict was found for the tenant. If the wit-

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ness was properly admitted, the verdict is to stand; otherwise it is to be set aside and a new trial granted.

T. G. Coffin, for the plaintiff, cited Com. Dig. Covenant, (B.) 3; *Baylye* v. *Hughes*, Cro. Car. 137; *Middlemore* v. *Goodale*, Cro. Car. 503; *Webb* v. *Russell*, 3 T. R. 393; *Abby* v. *Goodrich*, 3 Day, 433; *Clark* v. *Johnson*, 5 Day, 373; *Twambly* v. *Henley*, 4 Mass. 441; *Smith* v. *Chambers*, 4 Esp. 164; *Jackson* v. *Hallenback*, 2 Johns. 394; *Swift* v. *Dean*, 6 Johns. 523; *Marquand* v. *Webb*, 16 Johns. 89; *Van Nuys* v. *Terhune*, 3 Johns. Ca. 82; *Adams* v. *Cuddy*, 13 Pick. 460.

E. Ames, for the defendant, cited *Bowman* v. *Whittemore*, 1 Mass. 242; *Leighton* v. *Perkins*, 2 N. H. 427; 1 Greenl. Ev. § 428; *Howard* v. *Chadbourne*, 5 Greenl. 15.

Dewey, J. The only question raised in the present case relates to the competency of William C. Leonard, as a witness, in behalf of the tenant.

Leonard was the grantor of the premises in controversy, and conveyed the same to the tenant by a deed containing the covenant of warranty. Such a covenant, of course, makes the witness directly interested in the event of the suit, unless the interest has been in some way removed. This the tenant insists has been done by his giving Leonard a release from all the covenants contained in his deed to the tenant, which release has been duly acknowledged and recorded in the registry of deeds; and it is said, that such release, with the further fact that the tenant has never made any conveyance of the land, or any part thereof, presents a case of a valid and effectual release to Leonard from all future liability, upon his covenant of warranty.

It seems that every thing has been done that could be done to discharge the witness from his liability, upon the covenant; and if such release does not render the witness competent, it is for the reason, that his interest is such a legal interest as cannot be reached by a release. And it is supposed by the demandant to be of that character, by reason of its being a covenant running with the land, and passing to each successive grantee of the estate.

No question can arise as to the nature of this covenant.

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nor any doubt exist as to its being one of that class of covenants that run with the land, which may be enforced by an assignee in his own name. But all this may be true, and yet the inquiry returns, whether this covenant cannot be discharged by the party to whom it was made, while he holds in his own right the entire interest conveyed, and in the same state in which it was when conveyed. As such grantee, the party to whom the covenant was made might release to his warrantor all the estate conveyed, and thus discharge the covenant of warranty. He might convey any portion of the land, or create a lien or charge upon it, or burden it with a servitude by way of easement; and having the entire estate liable thus to be incumbered by him, and being the lawful owner of all the covenants connected with the grant to him, it would seem to follow, that he might by a proper instrument, duly executed and recorded, effectually release any covenants in the deed from his grantor.

The objection, however, is, as before stated, that the covenant of warranty is a covenant running with the land, which passes to each subsequent grantee, in whom the right vests accordingly to enforce such covenant against the warrantor. This is doubtless true, when the land is conveyed to a third person; such covenant remaining in full force and no event having interposed to defeat or discharge it, or to release the warrantor from any future liability thereon. But, certainly, such covenant does not always pass to each subsequent grantee. Suppose the case of an eviction of the first grantee by a paramount title, and a payment thereupon by the warrantor of damages to his grantee, to the full amount of the damages caused by his warranty: I take it as conceded, that this payment would discharge the liability of the warrantor. And yet the grantee may afterwards, in form, convey the premises to some third person; but such grantee would not succeed to any right to enforce the covenant of warranty made by the original grantor; and this not because the covenant of warranty is not a covenant running with the land, but for the reason, that in the particular case supposed the covenant was discharged while in the hands of the first

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grantee, and therefore could not pass to his assignee. All that the second grantee takes is the right to all covenants running with the land, that have not been legally discharged, or become mere choses in action, in the name and right of some previous grantee.

But it is urged that there has been no legal discharge of this covenant of warranty in the present case. It is difficult to perceive how more could have been done to give effect to this discharge of the covenant. The release is in apt words, duly executed by the party, and acknowledged and placed upon the records of the registry of deeds, with appropriate references from the same to the original deed. It is, however, insisted, that the registry of this release is of no effect, as it is not an instrument which is properly the subject of record in the books of the register of deeds. This presents a point of more difficulty. Treating the release as a mere release of an ordinary kind, or writing obligatory, it would not be a proper subject for record in the registry of deeds. But as a release of a covenant running with land, and attached to a deed already the subject of record, there are peculiar reasons why such a release might be held to be so closely connected with the conveyance of real estate, as to become a proper subject for record in the registry of deeds. If the release materially affects the title and interest in real estate, or any incidents therewith connected, then such instrument, thus qualifying or releasing an interest in the estate or in any covenants connected therewith, that might be the subject of sale and transfer, as incident to a conveyance of the land, would, by being duly recorded, give as effectual notice to a subsequent purchaser, as a release or quitclaim of some portion of the land, or of some undivided interest in the estate, or a grant of an easement in the same, of all which latter instruments the record would be effectual notice to a subsequent purchaser. These considerations will have their proper weight, whenever a case arises upon such covenant of warranty, by an action instituted in favor of a purchaser, taking a conveyance after his grantor has executed such release, and after the release is recorded. It

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will in such case become necessary to decide the question, whether such release duly executed and recorded in the registry of deeds will effectually discharge the grantor from the covenant of warranty, as respects an assignee of the land taking the same subsequently. The present case does not require us to express any opinion upon that question.

The objection to the competency of Leonard as a witness is taken by the demandant. It assumes, as the ground of objection, that Leonard has a pecuniary interest in procuring a verdict in favor of Snell, the tenant. The sole inquiry then is, has Leonard any such interest? Will he in any way be benefited by a verdict in favor of the tenant? Now, it is quite obvious that upon the facts before us, Leonard had no such interest, but on the contrary, would be more effectually secured from all possibility of pecuniary responsibility by a verdict in favor of the demandant; Leonard holding this release from the tenant, a judgment in favor of Field, the demandant, would render the release entirely effectual to the witness. Suppose a recovery in the present action by Field, the effect of such recovery would be, that Field would acquire the title and the possession of the demanded premises by a judgment of this court, being the highest evidence of title. Such recovery and judgment in favor of Field ousts Snell, and thereby the course of warranty by Leonard to Snell is at once broken. The breach of this covenant has taken place, while Snell held the covenant, and he alone can recover damages for such breach. But all claim for such damages has been released by his release of the covenant to Leonard; and thus in the case supposed Leonard has the full benefit of his release. Indeed, it renders it wholly effectual. The covenant of warranty attached to Leonard's deed to Snell, after such breach, would not run with the land so as to pass to any subsequent grantee of the same. Nor could Snell, in such case, make any subsequent valid conveyance of the premises, if the verdict and judgment were in favor of Field. He would be disseized, and so could make no conveyance of the land, or transfer the covenant of warranty or other covenants running with the land.

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It is quite obvious, therefore, that the witness, holding a release from Snell, discharging him from all liability upon his covenant in the deed to Snell, had no interest in obtaining a verdict in favor of Snell; for a recovery by Field would make his release from Snell entirely effectual in discharge of all future liability on his warranty, whatever might have been the rule of law, as to the general effect of a release of this covenant by a party holding a deed with covenant of warranty. Upon this ground, it is quite clear, that the witness was not interested adversely to the demandant, and the exception taken to his competency is untenable. As authorities sustaining these views, see *Cunningham* v. *Knight*, 1 Barb. 399, 405; *Clark* v. *Johnson*, 5 Day, 373; *Ford* v. *Wadsworth*, 19 Wend. 334. *Judgment on the verdict.*

Lewis T. Wade *vs.* Ebenezer Lobdell.

The guardian of a minor, on the coming of age of his ward, having settled an account with him, and taken his receipt in full for the balance due as guardian, and being afterwards summoned into the court of probate, upon the petition of the ward, to settle his guardianship account; it was held, that notwithstanding such settlement and receipt, the guardian was bound to answer on oath proper interrogatories respecting his account and the items thereof, and that the ward might introduce evidence touching the execution and validity of the receipt.

Where a question of fraud arises in the probate court, as incidental to any subject of which that court has jurisdiction, the judge must take cognizance of it and try it, in the same manner as any other question of fact.

This was an appeal from a decree of the judge of probate for the county of Plymouth, argued in this court by *E. Ames*, for the appellant, and by *T. G. Coffin*, for the appellee.

Shaw, C. J. Lobdell, the appellee, late guardian of Wade, the appellant, was summoned into the probate court to settle his guardianship account. The respondent came in, and filed an answer in the nature of a plea, stating that after his ward came of age, the guardian and ward settled their

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accounts, with which the ward was satisfied, and Lobdell paid Wade $1230·32 in full; that Wade then gave him a receipt in full, dated January 10th, 1849,* and he tendered the account and receipt, and prayed to be discharged from all further liability to account.

Thereupon, the appellant, by a motion in writing, filed by his attorney, prayed the judge of probate to examine Lobdell under oath, in regard to the pretended settlement, and in case this should not be done, tendered evidence to show that the receipt was obtained by false and fraudulent pretences, and ought not to preclude him from having a decree requiring Lobdell to settle anew his guardianship account.

The decree is not very full, but after setting forth the petition and citation, and the answer of the guardian averring the settlement and receipt; and that after a full hearing, and it being made to appear that the settlement was made, Wade acknowledged the receipt of the sum named, in full for the balance; it thereupon ordered that Lobdell should not be required further to account.

The reasons of appeal, in addition to the general reason, that the decree should have been the other way, are, that the judge declined to put Lobdell under oath, or to require him to answer interrogatories, and also refused to hear evidence offered by Wade to prove the settlement fraudulent.

The court are of opinion, that this decree was erroneous on both grounds.

A guardian sustains a fiduciary relation to the ward; he is charged with the authority and management of all his property and affairs, during his age of incapacity, and is bound to account, on oath, for all his acts. Rev. Sts. *c.* 79, § 5, art. 3, and also § 20; Rev. Sts. *c.* 67, § 7. And this liability extends not merely to attesting on oath generally to the truth and correctness of the account, but to answering specifically

* The following is a copy of this receipt: —

"Rec'd of Eben. Lobdell Twelve hundred and thirty $\frac{32}{100}$ dollars, and is in full for the balance due as guardian to me while under age. Lewis T. Wade."

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all questions concerning it. *Bard* v. *Wood*, 3 Met. 74. Besides, the settlement by a guardian with his ward *in pais*, without the aid or intervention of a court of probate, soon after the ward comes of age, is to be regarded with the strictest scrutiny.

But upon the other point, we think the evidence ought to have been received and weighed, in order to decide whether the receipt in question was or was not obtained by fraud; because, if it was, it was invalid and void. It was intimated in the argument, that the court of probate had no jurisdiction to inquire into and decide a question of fraud. When a question of fraud is incidental to any subject of which the probate court has jurisdiction, they must take cognizance of it and try it, in the same manner as any other question of fact. Suppose the ward had denied his signature; must not the judge of probate have received evidence upon the genuineness of the signature, and passed judgment upon it? But a signature obtained to an instrument by force, duress, or fraud, no more binds the signer than a forged signature. The principle is considered in the case of *Holland* v. *Cruft*, 20 Pick. 321.

If a court of probate must pass upon matters involving questions of fact, as they often must in deciding upon matters of account, they must inquire into the truth of such facts judicially, and for that purpose admit all competent evidence. Were it otherwise, a paper, purporting to be signed by a party to be affected by it, must be taken not only to be genuine, but to be conclusive, without regard to the circumstances under which it was obtained.

The decree must be reversed, and the case remitted to the probate court, with directions to receive proof, if offered, touching the execution and validity of the receipt relied upon by the guardian, and also to require the guardian to answer proper interrogatories, on oath, respecting the account and the items thereof.

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JAMES N. SEVER *vs.* NATHANIEL RUSSELL.

4c 513
175 269
4c 513
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191 217

This court, as a court of chancery, has no jurisdiction, where the ground of the application is the alleged fraud or improper conduct of an executor, in the execution of his trust as such, in reference to a matter properly embraced in and settled by his account as executor in the probate court; even though such account was settled without notice to the parties interested.

THIS was a bill in equity, from which, and from the answer thereto of the defendant under oath, and certain exhibits produced by the plaintiff, the following case appeared:—

Mercy Sever, widow, died on the 9th of February, 1810, leaving a will dated on the 20th of December preceding, by which she appointed the defendant her executor, and provided that all the property, of which she might die seized, should be placed in the hands of her son George Russell, he becoming "obligated" to pay the interest of the whole sum, annually, to her daughter Nancy Sever, during her widowhood; and, after her marriage or decease, the property to pass, one half of it to captain James Sever, and the other half to the children of John Sever, deceased, in equal shares.

The defendant, as executor, returned an inventory into the probate court, of the estate of the testatrix, amounting to $2172·55; and, on the 7th of August, 1811, presented his account as executor, in which he charged himself with the amount of the inventory, and claimed an allowance and was allowed for sundry expenses and payments, by which the account was balanced. Amongst the payments allowed was one of $1600 to George Russell, being the residue of the estate of the testatrix, after all the other payments had been made, in compliance with the direction of the will; for which payment George Russell gave the defendant a receipt and obligation, by which he undertook to pay the interest and dispose of the principal of the said sum, agreeably to the will of Mercy Sever. It did not appear by any record or document in the probate court, that the parties interested had any notice of the presentation and settlement of this account.

From the 7th of August, 1811, when this account was

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settled, George Russell paid the interest of the said $1600. annually, to Nancy Sever, until his decease in 1822. The defendant was appointed administrator of George Russell, and as such represented his estate as insolvent. Commissioners of insolvency being appointed, the defendant, as the executor of the will of Mercy Sever, laid before them [illegible] proved, as a demand against the estate of George Ru[illegible]e receipt and obligation given by him to the defendant on receiving the said sum of $1600 from the estate of Mercy Sever. On this demand, which was allowed by the commissioners, the defendant received a dividend of $1062·25, which, with the common consent of all concerned, (although always ready to give it up to any one competent to receive the same,) he retained in his hands as *quasi* trustee under the will of Mercy Sever, and paid the interest thereon, $63·75, annually, to Nancy Sever, until just before her death on the 14th of May, 1848.

The plaintiff, as one of the heirs of John Sever, and as administrator of the estate of Nancy Sever, brought this bill, in his own individual right, and as such administrator, and in behalf of all other persons entitled to shares in the trust above mentioned, who should come in as parties, and contribute to the expenses of the suit, to have the defendant adjudged trustee of the whole sum of $1600, paid by him from the estate of Mercy Sever, to George Russell, and decreed to pay over the same, with interest, to the parties to whom it was bequeathed, after the decease of Nancy Sever.

The plaintiff averred, in the bill, among other things, that on the settlement of the defendant's account as executor of Mercy Sever, no notice whatever was given to the parties interested to be present; that George Russell, at the [illegible] of the alleged payment to him, was insolvent, and so [illegible] to be by the defendant; that he never gave bond, agreeably to the statute of 1811, *c.* 96, "requiring the trustees of the property of minors and others to give bond in certain cases;" nor was he appointed trustee by the judge of probate; both of which conditions would probably have been required of him, if the parties interested had known of the presentation of the

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defendant's administration account to the judge of probate; that the said sum of $1600 was paid by the defendant to George Russell, in part, namely, to the amount of $1114·25, by the defendant's paying that sum on a note to William Sever, for which the defendant was liable as the surety of George Russell, and the balance was made up of other claims of the defendant on George Russell; and that if the defendant, according to the true intent of the will of Mercy Sever, had paid the amount of $1600, in money, to said George, or had put real value into his hands to that amount, he might have safely invested the same, as trustee in fact, though not appointed by the probate court; so that his insolvency never would have prevented him from a faithful payment of the interest and principal of the whole sum, as directed by the will of Mercy Sever.

The plaintiff, further averring that matters of trust, and cases in which there are more than two parties having distinct rights and interests, which cannot be justly and definitively decided and adjusted in one action at law, are by statute made relievable by this court in equity, prayed the court to adjudge and decree, that the defendant was trustee of the entire and full sum of $1600, with interest from the time George Russell last paid interest before his death in 1822, deducting therefrom the amount of the payments of $63·75, annually, by the defendant since the decease of George Russell; that the receipt and obligation of the latter to the defendant, described in the defendant's account, given as aforesaid, was no discharge of the defendant, or payment within the meaning of Mercy Sever's will, by the defendant, of the said sum of $1600; and that the defendant should be decreed to pay the full sum aforesaid, with the arrears of interest thereon, to the parties entitled to the same, without any deduction by reason of George Russell's insolvency.

The defendant, in his answer, averred, among other things, that the sum of $1114·25, part of the $1600, charged in his account as paid by him to George Russell, was paid for George Russell on a note signed by him and by the defendant as his surety, in good faith, and as he believes, at George

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Russell's request; that the residue of said sum of $1600 was paid in cash; that the defendant had annually paid Nancy Sever the interest on $1062·65, received by him from the estate of George Russell, in 1822, from that time to January, 1848; that he was and always had been ready and willing and had offered to pay the plaintiff, as the administrator of Nancy Sever, interest on the said $1062·65, from January 1st, 1848, to May 14th, 1848; that he was ready and had offered to pay one half of said $1062·65 to the executors of captain James Sever, and the other half to the children of John Sever deceased, with interest from Nancy Sever's decease, excepting therefrom what the court might allow the defendant for his services, and excepting also the share of one of the children of John Sever, deceased, who had received his share of said $1062·65, of the defendant, and had discharged him in full therefor; that, from the time of the payment to George Russell, in 1810, down to the time of the death of Nancy Sever, nearly thirty-eight years, the said payments, acts and proceedings of the defendant, as the executor of Mercy Sever, had been acquiesced in by all persons interested in the trust fund, so far as the defendant ever knew or could recollect; that such acquiescence was a bar to the plaintiff's claim; that no action at law or in equity could be brought against the defendant for any unfaithful discharge of his duty as the executor of Mercy Sever's will, after such a lapse of time; that the settlement of the defendant's account in the probate court rendered the matter a thing adjudged; and the defendant insisted on the statute of limitations, and claimed the benefit thereof, as if pleaded.

E. Ames, for the plaintiff, to the points considered by the court, argued as follows:—

1. This bill is analogous to one brought to set aside a decree of the probate court for fraud; it charges the defendant with having derived an advantage to himself, at the expense of the property committed to his charge; and it seeks to recover the amount of such loss. Against such a bill, therefore, the proceedings of the probate court would not protect the defendant, even if all the parties in interest had

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been duly notified thereof. *Giffard* v. *Hort*, 1 Sch. & Lef. 386, 396; *Loyd* v. *Mansell*, 2 P. Wms. 73; *Richmond* v. *Tayleur*, 1 P. Wms. 734; Welford, Eq. Pl. 246, 247, and cases there cited.

2. The record showing no notice, it is to be presumed, that no notice was given; and, therefore, the allowance of the account by the judge of probate is not binding on the *cestui que trust*. *Hathaway* v. *Clark*, 5 Pick. 490; *Brunswick* v. *McKean*, 4 Greenl. 508; *Chase* v. *Hathaway*, 14 Mass. 222; *Wiggin* v. *Swett*, 6 Met. 194, 199; 1 Greenl. Ev. § 20.

The counsel also argued the case fully upon the merits, citing *Elliot* v. *Merryman*, Barn. Ch. 78; *Keech* v. *Sandford*, 3 Eq. Ca. Ab. 741; 1 White & Tudor's Lead. Eq. Ca. (Am. ed.) 47–55, 58–77; Lewin, Tr. 288; *Chapin* v. *Weed*, 1 Clark, Ch. 464, 469; *James, ex parte*, 8 Ves. 337, 345; *Poillon* v. *Martin*, 1 Sandf. Ch. 569; *O'Herlihy* v. *Hedges*, 1 Sch. & Lef. 123, 126.

W. Davis, for the respondent.

Wilde, J. Several points have been stated and argued by counsel in this case, which we have not found it necessary to consider, the court being of opinion, that this court as a court of chancery has no jurisdiction. The case of *Jennison* v. *Hapgood*, 7 Pick. 1, 7, is directly in point; and the law in that case is, we think, laid down by chief justice Parker with entire accuracy: "As to all the accounts and proceedings in the probate court, where upon the face of them that court has jurisdiction, this court, as a court of chancery, has no jurisdiction, but will hold all that has been properly done there as conclusive. If any one was injured by any order or decree of that court, the remedy was by appeal to the supreme court of probate. If, as the plaintiffs allege in the amended bill, the proceedings were void for fraud, and if the plaintiff may treat them as a nullity, that would not give this court, as a court of chancery, original jurisdiction. If the proceedings are merely void, the defendant must be cited to account in the probate court. If errors have happened, they are to be corrected in that forum, if corrected at all." All these remarks apply directly to the present case. The defendant was

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the executor of the last will and testament of Mercy Sever, and he settled his final account of administration in 1811, which was then allowed by the judge of probate.

It has been argued, that no notice was given to the parties interested of the settlement of the account, and it does not appear by the record that any notice thereof was so given. But, if there had in fact been no notice, the defect would not give this court, as a court of chancery, jurisdiction, as before remarked. But there is no doubt, that notice in this case must be presumed. It is remarked by Jackson, J., in the case of *Brown* v. *Wood*, 17 Mass. 68, 72, that "Upon the common presumptions in favor of every judicial tribunal, acting within its jurisdiction, we must suppose that all persons concerned had due notice. The presumption in the present case is strengthened by the knowledge we have, that in many counties, it was not customary to mention in the decree, that such notice had been given." So, after a long acquiescence of heirs and creditors in the sales of real estates, by executors and administrators, notice of the sales by them may be presumed. *Leverett* v. *Armstrong*, 15 Mass. 26. And after such a long acquiescence in the settlement of the defendant's account, it may be well doubted, whether it ought to be opened on a charge of fraud. The counsel for the plaintiff admits that the defendant is not chargeable with any moral fraud; and we apprehend it would be difficult to make out a fraud in law. But it is not necessary to advert to the facts on this point, as it cannot be decided so as to bind the parties in this action. *Bill dismissed.*

HANNAH S. MORTON *vs.* LEMUEL MORTON.

Scire facias is a proper process to enforce payment of arrears of alimony.

THIS was a petition, presented to the court at the last May term, in which the petitioner set forth, on oath, that at the term of this court, held at Plymouth, in May, 1848, she was

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duly divorced from the bed and board of the respondent, on the ground of excessive cruelty; that at the same time alimony was granted to her, at the rate of $100 a year, payable quarterly by the respondent; that one year's alimony was due, no portion of which had been paid; and that the respondent wholly neglected and refused to pay the same; wherefore, the petitioner prayed, that a process of attachment, or other proper process, against the respondent, might be granted to her, and that such proceedings might be had in the premises as to right and justice should appertain.

A. C. Spooner, for the petitioner.

The respondent appeared in person.

Shaw, C. J. The petitioner, in the present case, stated, that at a previous term of this court, she had obtained a decree of divorce from the respondent, and had been allowed alimony, that an instalment of the alimony remained unpaid, and she prayed for some process to coerce the payment.

The application was regarded by the court as one of considerable practical importance, and they thought best to take time for consideration. The question has often been raised respecting the proper mode of proceeding in such cases; whether the wife shall have process of contempt, for disobeying the order of the court to make periodical payments; or whether she shall have execution, upon motion and affidavit, showing that the parties are living, and that the alimony has not been paid; whether a notice to the husband to show cause should first be given, and if so, what length of notice and how given. *French* v. *French*, 4 Mass. 587. This court had previously decided, upon consideration, that execution was a proper process, for carrying into effect their decree for alimony. That, however, was a decree for the payment of one sum at one time only, and nearly similar to a common judgment for a debt. *Orrok* v. *Orrok*, 1 Mass. 341. It is provided by the Rev. Sts. *c.* 76, § 38, that the supreme judicial court may issue process of attachment, and of execution, and other proper process, necessary for the despatch and final determination of such causes.

With this view of the powers of the court, and of the

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object to be accomplished, that of requiring successive payments, at fixed times, during the lives of the parties, or until the further order of the court, we have thought that a writ of *scire facias* is one well adapted to the case, and is a proper process. The case is quite analogous to those in which *scire facias* has been in familiar use, and the court would have hardly hesitated in directing it, but for the fact that since the law of divorce has been in operation, it is not known that there has been a precedent for it.

Scire facias is a judicial writ, founded upon a record, which must issue from and be returnable to the court where the record is, and the object of which is to revive a judgment between the same parties, and carry it into effect after a lapse of time; or to bring in some new party as executor or administrator; or to charge a party directly who appears by the record to be partially and collaterally liable on the record, as bail, after principal has avoided, trustee who has been charged on his answer or default, and paid over nothing on execution, the indorser of an original writ for costs for the defendant, when the plaintiff has avoided, and the like. But it is hardly necessary to describe minutely so familiar a process as that of *scire facias;* a few only of the cases most analogous may be taken for illustration.

In the case of *Collins* v. *Collins*, 2 Bur. 820, which was an action on a bond for the payment, amongst other things, of an annuity, it was held, that after judgment for the penalty and execution for instalments due, *scire facias* was the proper remedy for each successive default of payment. This decision is approved and acted on in the case of *Willoughby* v. *Swinton*, 6 East, 550. In debt on a probate bond, judgment is for the whole penalty, and each party is entitled to *scire facias* for his proportion. So on a sheriff's bond to the commonwealth and suit in the name of the treasurer. Rev. Sts. *c.* 14, § 64. But upon principle, it seems to us, that we must arrive at the same result. In the case already cited, it was held, that the order for the payment of alimony is so like a common law judgment for the payment of money, in debt or assumpsit, that an execution

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may properly issue for it, without the intervention of other process. But in that case, the parties were before the court, subject to its jurisdiction, with an opportunity to object, if objection would lie. But an order to pay money at successive future periods, though the persons and the sums are certain, is yet in its nature conditional. If the parties so long live, is one condition. Without an opportunity to appear and plead, and have day in court, how can the court judicially know, that both are alive, or that payment or satisfaction has not been made? Such was the difficulty which obviously pressed upon the court, in the case of *French* v. *French*; and although the original order in that case contained a provision, that successive executions should issue for the instalments in any county, yet the court said this could not be done without notice, plainly because the parties were out of court, and the court had no jurisdiction of the persons, without notice or summons of some sort.

Now, if notice must be given, — and we think it is clear, upon principle and authority, that it must, — what more plain, simple, direct, and efficacious mode can there be than a writ of *scire facias*, which the party may sue out of the clerk's office, as a matter of right, and have served in the simple mode provided by law? It recites the judgment, subsisting of record, in the court from which it issues; it recites the sum, the time of payment, and the failure of the defendant to make payment. It gives the defendant full and precise notice of what is claimed. Nearly the whole of the plaintiff's case is proved by the record. To this writ, parties, privies, guardians or attorneys, as the case may be, may appear, and if there be any good ground to bar the plaintiff of his claim to one or more instalments of alimony alleged to be due, there will be full opportunity to plead and maintain it. The court are of opinion, therefore, that the present motion of the wife, upon which, as we understand, no regular notice has been given, although the husband did appear in person to oppose it, cannot be granted. And the court recommend the writ of *scire facias* as the proper process to be used in like cases hereafter.

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Simeon Taylor *vs.* George L. Edson.

Poll parishes and voluntary religious societies, when not restricted by their charters or articles of association, may make by-laws declaring what shall constitute membership, and what shall operate as a forfeiture thereof, applicable to existing as well as to future members.

Where a religious society, not territorial, was incorporated, with a provision in the charter, that any person desirous of becoming a member might do so by entering his name with the wardens and vestry or clerk; and an act was subsequently passed, repealing this provision and authorizing the society to make by-laws determining the manner in which persons should thereafter become members, under which by-laws were accordingly made, in terms applicable as well to existing as future members; it was held, that a person, who was a member of the society under the provisions of their charter, ceased to be a member by failing to comply with the conditions of the by-laws.

This was an action on the case against the defendant as clerk of a religious society, known as Trinity church, in the town of Bridgewater, for refusing to receive the vote of the plaintiff, claiming to be a member of the society, in the choice of a moderator, at the annual meeting thereof in April, 1849. The trial was before *Bigelow*, J., in the court of common pleas.

The society in question was incorporated by the act of 1815, *c.* 12, passed on the 14th of June, 1815. By the second section of this act, it was provided, that any person who might desire to become a member of the society, and should enter his name with the wardens and vestry or clerk thereof, should be deemed, taken and entitled, and, with his poll and estate, be liable for all lawful taxes and assessments, as a member of the society; and that such members should be thereafter exempted, with their polls and estates, from all other taxes and assessments for the support of public worship, in the town or parish where they might respectively reside; provided, that persons subsequently becoming members should give notice thereof in writing to the assessors or clerk of the parish or town, where they might reside, and, until notice, should not be entitled to such exemption; and provided, also, that persons withdrawing from the said sociciety, who should give notice thereof in writing to the wardens and vestry, or clerk for the time being, should be no

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onger liable for any taxes or assessments afterwards granted and voted therein; and that they with their estates should again become liable and holden for all other taxes and duties for the support of public worship, in the parish or town where they might respectively reside, and as other inhabitants who were not entitled to any special exemption.

By the third section of the act, authority was conferred upon the society to pass all such by-laws and rules, as should be deemed necessary for the well-governing of the same, not incompatible with the laws and constitution of the commonwealth.

By an act, passed on the 15th of March, 1845, (*St.* 1845, *c.* 136,) in addition to the former act, it was provided (§ 1), that all questions relative to the use, occupancy, repairs or rebuilding of any church, edifice, or place of public worship, which Trinity church in Bridgwater might own, should be determined by the pew owners present and voting thereon, each pew owner to be entitled to as many votes as he should own pews in said church, edifice, or place of public worship; and (§ 2) that the corporation should have power to make by-laws, determining the manner by which persons should thereafter become members thereof. The third section of this act repealed the second section of the former.

On the 24th of March, 1845, the society, in pursuance of the authority conferred by the additional act, adopted the following by-laws relating to the subject of membership:—

"Article 1st. All owners of a pew or pews in this church, who shall subscribe and pay annually for the support of public worship in this church a sum not less than five dollars, and any person not a pew owner who shall hire or rent a pew in said church, and shall subscribe and pay annually for the support of public worship a sum not less than five dollars, in addition to the rent of said pew, shall be deemed members of this parish, and entitled to vote at the annual meeting of said parish, subsequent to such subscription and payment and during its continuance, and no longer.

"Article 2d. Such persons as neither own or rent a pew who shall regularly attend church, and shall subscribe and pay annually a sum not less than ten dollars for the support of public worship in this church, shall be deemed members, and entitled to vote as provided in the last clause of the section above.

"Any by-laws of this parish, inconsistent with the foregoing, are hereby repealed."

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It was in evidence, on the part of the plaintiff, that he was one of the persons, thirty-two in number, named in the act of incorporation of the said society; that his name was duly entered with the clerk thereof, as a member of the same, prior to the year 1816, in pursuance of the second section of the act of incorporation; that from that time to the annual meeting in April, 1849, the plaintiff had usually worshipped with said society, — had uniformly acted as a member thereof, — had been from time to time elected to various offices in the society, — and at the annual meeting in 1848, had been chosen a vestry-man; and that from the 23d of June, 1837, the plaintiff had been the owner of a pew in said Trinity church.

It was also in evidence, for the plaintiff, that at the annual meeting of the society duly called in April, 1849, for the purpose, among others, of choosing a moderator, the defendant, being the clerk of the society, presided at the choice of moderator, and the plaintiff offered to put in his ballot therefor, but the defendant refused to receive the same, on the ground, that the plaintiff was not entitled to vote in said society, because he had failed to comply with the by-laws above mentioned.

The defendant thereupon offered to prove, that the plaintiff had not complied with the provisions of the by-laws aforesaid, having failed to pay the sum named in the first article for the support of public worship; and contended, that by the operation of the third section of the act of incorporation, and of the second section of the additional act, relating to the adoption of by-laws, the plaintiff had ceased to be a member of the society, and had no right to vote therein.

But the presiding judge instructed the jury, that by the provisions of the act of 1845, empowering the society to pass by-laws, no authority was given to pass by-laws regulating the subject of membership; that the mode, in which a person might become a member of said society, was fixed and established by the second section of the act of 1815, and that the plaintiff having complied with the provisions of that

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section, and been a member of the society prior to 1845, was not affected in his rights by the act of 1845, and the by-laws of March 24th made in pursuance thereof, and that therefore his right of membership was not forfeited by a non-compliance with the said by-laws.

The jury returned a verdict in favor of the plaintiff, and the defendant alleged exceptions.

The case was argued in writing by *R. H. Dana, Jr.* (with whom was *R. Choate*), for the defendant, and by *H. G. O. Colby* and *W. Latham*, for the plaintiff.

The opinion of the court was delivered at the October term, 1850.

Dewey, J. The law of this commonwealth regulating religious societies, and defining the privileges as well as liabilities of individual members of such associations, must be found in our peculiar local history and usages, in our constitution, and the various statutes enacted by the legislature, from time to time, rather than in any general principles contained in the elementary books relating to corporations generally. So, too, in examining questions appertaining to this subject, it is to be remembered, that religious societies in this commonwealth have been materially modified during the present century in some respects.

Closely connected as were religious and civil rights, in the early period of our history, the right of membership in a parish or religious society seems to have assumed much the same character with the right to be an inhabitant of a town, and to be entitled to all the privileges of such inhabitancy. This right to the privileges seemed necessarily, and certainly very properly, to result from the correlative liability of each individual to be thus enrolled and made to bear the burdens of supporting religious worship. It was a legal duty, devolving on all the citizens, to contribute to the parochial charges; and the organization of parishes, to a great extent, being no other than the town organization, the voters were much the same, and the rights and duties of the inhabitants, as to municipal privileges and burdens, and as to membership, were acquired and lost much in the same way

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But this analogy was that of towns and territorial parishes. The various statutes of 1811, *c.* 6, 1823, *c.* 106, 1834, *c.* 183, the Rev. Sts. *c.* 20, and the amendment of the constitution in 1833, have, in the various changes introduced by them, materially affected the laws regulating territorial parishes. To what extent precisely, it is, however, unnecessary to decide, for the purpose of disposing of the present case. Those voluntary associations, known as poll parishes, have been established on different principles from territorial parishes, and particularly so as to membership. They are voluntary, and when unrestrained by their articles of association, or by their act of incorporation, if incorporated, are of course fully at liberty to prescribe terms of membership, from time to time, which terms will be of binding authority on all connected with the parish. The cases of *Fisher* v. *Whitman*, 13 Pick. 350, and *Oakes* v. *Hill*, 10 Pick. 333, may be referred to as bearing upon this point. The case of *Keith* v. *Howard*, 24 Pick. 292, in no respects conflicts with this view of the power of voluntary associations to regulate, at their pleasure, the terms of membership; the remarks there made being applicable to territorial parishes only.

We have no doubt, that in cases where no restrictions are found in the charter or articles of association, voluntary societies or poll parishes have a right to make by-laws, declaring what shall constitute membership, and what shall operate to cause a forfeiture of membership, and that such by-laws may as well apply to present as to future members.

It seems to us, therefore, that the only questions that require consideration in the present case are: 1st, whether the society, known as Trinity church in Bridgewater, is a poll parish; 2d, whether the act incorporating this society contains any restrictive words which take from the society the general power incident to poll parishes to regulate membership by their by-laws; and 3d, whether the by-laws of March 24th, 1845, adopted by this society, apply to those persons who were members at the time of their adoption, or are merely applicable to those who might afterwards become members.

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1. As to the first point, there can be no doubt, that this is a poll parish, and not a territorial parish. It has no territorial limits; includes nobody merely by reason of a particular residence; and its charter only incorporates as members those particular individuals who may voluntarily unite with the society.

2. As to the second point, whether the act of incorporation contains any restrictive words, precluding this society from regulating the terms of membership, the court are of opinion, that the provisions of the second section do not restrain the society from exercising the general power, incident to poll parishes, to regulate membership and to prescribe the terms and conditions of such membership, so far as appertains to parochial matters. It is true, as is urged on behalf of the plaintiff, that by the second section of the act of incorporation, a mode is provided, by which one may become a member of the society. This provision, and in the form in which it here exists, is not unusual, and will be found in many other acts of incorporation of religious societies.

The leading object, and perhaps the principal one, in the view of the legislature, in enacting the second section of the act, was to make adequate provision for the exemption of those, who were members of this society, from all other taxes for the support of public worship in the town or parish in which they resided, and in which but for such provision they might be liable to assessment for such purposes. In inserting this provision in the act of incorporation, we do not suppose that the legislature intended to restrain the persons associated, from introducing other provisions and regulations necessary for the well being and perhaps essential to the very existence of the society, as a living active body, as for example, that of requiring, as a condition of membership, a contribution to the expenses incident to the support and maintenance of a public preacher or pastor. In poll parishes, where the town system of taxation upon the polls and estates is comparatively rarely resorted to, it can hardly be supposed, that the legislature would thus restrict the parish, in a matter so material to its usefulness, if not to its very existence.

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We are of opinion, that this society had the ordinary powers, incident to poll parishes, to regulate by their by-laws the terms and conditions of future membership; that such regulations might be prospectively applied to existing members; and that such persons might lose their rights as members, by their neglect to comply with the by-laws of the society.

3. The next inquiry is, whether the by-laws adopted by this society March 24th, 1845, apply to those who were members before its adoption. The language of these by-laws is general; and the subject of them as stated in the title is "membership." The obviously expedient rule, and one we should anticipate would be adopted, would be one alike operative upon old and new members, in reference to their liabilities and forfeitures for neglect to contribute to parochial charges. The symmetry of the system would require such a rule, and this seems to be the reasonable construction of these by-laws.

The statute of 1845, *c.* 136, which repeals the second section of the original act of incorporation, is in perfect harmony with the views which we have taken of the power of the society to regulate the subject of membership, and directly provides for the adoption of such regulations by subsequent by-laws. In terms, the statute is prospective in its application; but repealing, as it does, absolutely, the second section of the act of incorporation, its effect and purpose would seem to be to provide prospectively as to the admission of new members, and incidentally to affect all members, so far as to prescribe conditions of continuing membership.

Upon the whole matter, the court are of opinion, that the exceptions to the ruling of the court of common pleas must be sustained. *Verdict set aside, and new trial granted.*

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NATHAN WILLIAMS *vs.* SAMUEL ROBINSON.

A discharge in insolvency, granted at a third meeting of creditors, called after the expiration of six months from the appointment of assignees, is void.

THIS was an action of assumpsit on a promissory note for $61·69, dated June 2d, 1843, payable to the plaintiff on demand with interest, and signed by the defendant. The writ was dated February 20th, 1846.

At the trial before *Ward*, J., in the court of common pleas, the plaintiff having proved a *prima facie* case, the defendant relied upon a discharge under the insolvent laws. The certificate of discharge was in due form, and bore date February 22d, 1848. The plaintiff contended that the discharge was invalid, because there was no third meeting of the creditors called within six months from the appointment of the assignees. It appeared, by the record of the proceedings in insolvency, that the assignees were appointed and the assignment dated March 27th, 1847; that the second meeting was held May 29th, 1847; and that the third meeting was held February 22d, 1848, at which no claims were offered for proof, and the defendant's discharge was granted.

The judge ruled that the fact, that the third meeting was not held within six months, was sufficient to defeat and avoid the discharge. A verdict was thereupon taken for the plaintiff, and the defendant excepted.

The case was argued at the last term by *T. G. Coffin*, for the defendant, and *T. D. Eliot*, for the plaintiff.

FLETCHER, J. The only question raised in the case is as to the validity of the defendant's discharge. The objection to the discharge rests on the ground, that there was no third meeting of creditors called within six months from the appointment of the assignees.

The statute expressly requires, that the assignees shall call a third meeting of the creditors, within six months from the time of their appointment, at which meeting creditors who have not before proved their debts shall be allowed to prove them; so that the law requires, that there shall be three

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meetings, at which claims may be proved, within six months. No creditors but those who have proved their claims can dissent from the discharge; and the dissent is expressly required to be within six months.

The third meeting, at which the discharge in the present case was obtained, was after the expiration of six months. If creditors had proved their claims at this meeting, such creditors could not have dissented from the discharge, because the statute expressly and unconditionally requires, that the dissent shall be within six months.* When this discharge therefore was obtained, those creditors only who had proved their claims, at the first two meetings, had been in a situation, or had had an opportunity to dissent from the discharge; while all the creditors, who might have intended to prove their claims at the third meeting, were wholly deprived of the right to dissent, as there was no third meeting within six months, within which time the dissent must be made.

It might very naturally be expected, as a matter of course, that a large portion of the creditors would delay the proof of their claims to the third meeting, knowing that the law requires that there should be such a meeting within six months, within which time they might dissent from the discharge. Therefore, when there is no third meeting, within the time limited, a large portion of the creditors will be deprived of the right which the law gives them of dissenting from the discharge.

Although it may be no fault of the debtor that a third meeting was not called within the time limited, still it is essential to the validity of the discharge, that it should be reached through the previous steps required by the statute, and the security of the debtor requires that he should see to it, that there is a compliance with the requisitions of the statute. It will not do to leap over the preliminary proceedings and come at once to the discharge, without them. The various proceedings of the insolvent law are connected, and have a mutual dependence upon each other. If some fail

* See the case of *Revere* v. *Newell*, *post*, 584.

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others fail with them. If the checks upon granting a discharge provided by the law are defeated and annulled by the course of proceeding, the discharge itself cannot have validity. It has been decided, by this court, in the case of *Sanderson* v. *Taylor*, 1 Cush. 87, that where a discharge was granted, when there had been no third meeting, the discharge was void, because the creditors had not had the opportunity, intended by the statute, to prove their claims, and put themselves in a condition to dissent. In the present case, though there was a third meeting, yet it was of no avail to the creditors, as it was then too late to dissent, if they then proved their claims. The present case, though it varies from the above somewhat in its facts, is yet clearly within the same principle. *Exceptions overruled.*

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF NORFOLK, OCTOBER TERM 1849, AT DEDHAM.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE,
HON. CHARLES A. DEWEY,
HON. RICHARD FLETCHER,
} JUSTICES.

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FRANCIS HILLIARD *vs.* STEPHEN M. ALLEN & others.

This court has jurisdiction in equity, to enforce the specific performance of a contract for the purchase of land, which the intended purchaser refuses to complete, on the ground, that a third person has a lien upon the estate, under a building contract with a former owner.

The lien upon real estate, created by recording a building contract under the Rev. Sts. *c.* 117, §§ 1, 2, cannot be preserved for a longer period than six months, without the commencement of a suit to enforce the same, by any considerations of equity, or of greater benefit to all parties, in favor of a postponement, or by means of any parol agreement, or covenant, however formal, for the same purpose.

Where a mortgagee of real estate, to whom the mortgagor was also indebted under a building contract relating to the same land, which had been duly recorded, but had not been enforced by a suit thereon within six months, as required by the Rev. Sts. *c.* 117, §§ 1, 2, 3, entered upon the mortgaged premises for condition broken; and it was thereupon agreed between the parties, that the mortgagee should let the estate, and apply the rents to the debt under the building contract; after which and before any rent had been received or become payable, the mortgagor

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took advantage of the insolvent law; it was held, that the rents subsequently received by the mortgagee must be deemed to have been received by him in that capacity, and be accounted for as such.

This was a suit in equity, brought by the plaintiff, as the assignee of Samuel C. Bugbee, an insolvent debtor, to compel the defendant Allen to receive from the plaintiff a deed of certain premises described in the bill, and to pay the agreed price therefor, without deduction on account of an alleged lien thereon; and to compel the other defendants, Josiah Richardson and Daniel Jackson, to relinquish and discharge, and to be perpetually enjoined from attempting to enforce, the said lien.

The case was argued at a former term by *F. Hilliard*, for himself, and by *J. J. Clarke*, for the defendants Richardson and Jackson.

All the facts material to be stated are set forth in the opinion of the court.

Shaw, C. J. The bill in this case sets out a sale of an estate belonging to the insolvent, at auction; that it was sold subject to certain incumbrances, estimated at a certain amount, but with a stipulation, that the sum to be paid by the purchaser should be more or less than the sum bid, in case the incumbrances should exceed or fall short of the estimated amount. Allen purchased the estate, and gave his written agreement accordingly.

The bill then alleges the tender of a deed to Allen, and a demand of the purchase money; but that the defendants Richardson and Jackson claim to have a lien on the estate, under a building contract, pursuant to the provisions of the statute called the mechanics' lien law, to the amount of $378, by reason of which Allen refuses to take his deed and pay the money. The bill then avers, that the said Richardson and Jackson have no such lien, and calls upon them to come in and set forth the grounds of their claim; and if the lien is not established, then to release and discharge all such claim, so that the plaintiff can give, and the defendant Allen can take, a deed of the estate, discharged of any such supposed incumbrance.

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The answer of Richardson and Jackson admits most of the facts, and sets out that they themselves are holders, as original mortgagees or assignees, of two mortgages on the premises. They assert that they have such a lien, under a building contract, for $389; that they have entered on the estate, as mortgagees; and they set forth an agreement between Bugbee and themselves, that they should let the premises and apply the income to the discharge of their debt due under the building contract.

In this answer, it is manifest, that the response goes beyond the matter set forth in the bill, which was strictly confined to the point of lien. But the plaintiff, having amended his bill, sets out a request made to the defendants, Richardson and Jackson, for an account of the amount due to them on their mortgages, and a paper handed to the plaintiff as such account, embracing the amount due on the two mortgages, the building contract, and another sum of $239 for expenses. The amended bill denies that Bugbee ever made such an agreement, respecting the application of the rents to the discharge of the debt due on the building contract. It avers that the defendants never claimed under such supposed agreement, till about the time of the filing of the bill, but rested their claim upon other and distinct grounds.

The answer to the amended bill reiterates the matter contained in the former answer, admits the delivering of the paper, stating the defendants' claims to be substantially correct, as delivered by one of the defendants to the plaintiff, and reiterates the verbal agreement.

This is a very brief statement of the pleadings. At the hearing, the parties entered into an agreement in respect to most of the facts, and by mutual consent referred the court to Bugbee's deposition, for the testimony contained in it, with liberty to draw all conclusions.

Taking the facts as thus agreed, it appears that Bugbee entered into a contract with Richardson and Jackson, in October, 1844, to finish and complete the house, on which the defendants had already one or both of the mortgages; that they proceeded and finished the house according to the

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terms of the contract; but though more than six months elapsed from the completion of the contract, they never filed any petition for the sale of the house according to the provisions of the mechanics' lien law.

It also appears, that the defendants contend for condition broken under both mortgages, about the 10th of February, 1845; that the insolvent, Bugbee, did enter into a parol agreement with them, that they might lease the house, and take the rents, and apply the same to the discharge of their debt, under the building contract; that they did, some time in April, 1845, let the house, but that before any rent was received or became due, Bugbee became insolvent, and applied to a master in chancery, and the usual proceedings were had, under which the plaintiff was chosen assignee.

1. The first question is, whether the court has jurisdiction in equity. We have no doubt that the court has jurisdiction. It seems to be a case coming under that head of equity, where there are more than two parties, having distinct rights and interests, which cannot be embraced and settled in one action at law. But we think it comes quite clearly under another head of equity, where the court has jurisdiction to enforce the specific performance of contracts. *Salisbury* v. *Bigelow*, 20 Pick. 174. That was a bill to enforce the specific performance of a contract to purchase land, brought by the seller against the buyer, and where the question was, whether the seller could give a good title. Nor can we see any adequate remedy at law. The plaintiff, being a mere assignee, is not supposed to have funds to redeem; all he could reasonably be supposed to do would be to sell the right of redemption, upon such terms as would make it most productive to the creditors, and this could only be done by clearing it from alleged pretended claims, incumbering the estate; and the alleged lien claimed by the defendants in their answer, if not well founded, is a cloud of that description. Rev. Sts. *c.* 81, § 8, *cl.* 3, 6.

2. Upon the main question set forth in the pleadings and argued at the bar, the court are of opinion, that if the defendants ever had a lien on the premises, under the build-

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ing contract, by recording it and otherwise complying with Rev. Sts. c. 117, § 1, it had been dissolved, and did not subsist at the time of the filing of this bill. This right is given by statute; and a peculiar remedy is prescribed for enforcing it, which is expressly limited to the term of six months. The second section requires it to be recorded pursuant to the policy of the registry laws; and any person having occasion to search the records for titles and incumbrances, finding such a contract recorded, knows that if proceedings are not instituted in six months after the contract is performed, the estate is clear from that incumbrance. The statute provides, in express terms, (§ 3,) that the lien shall be dissolved at the expiration of six months, unless a suit for enforcing the lien shall have been commenced within the six months. No considerations of equity, no suggestion that it would be better for all parties that the suit should be postponed, no parol agreement, and no covenant, however formal, short of a mortgage, amounting of itself to a new lien, can save it.

3. Another question has been considered at the bar, namely, what is the effect of the alleged agreement of Bugbee with the defendants, that they should appropriate the rents of the estate towards the reduction of their debt under the building contract; because it is obvious, that if they can so appropriate these rents, they are relieved from the obligation to account for them towards the interest and principal of their mortgage debts, and thus leave the incumbrance on the estate so much the larger.

Perhaps, as these pleadings stand, it is not regular to go further than to declare and decide, that the lien on the building contract no longer subsisted. Strictly and in due form, the question proposed would arise only in the case, where, if the lien existed, it was to be reduced by the application of these rents. This is not regularly a bill to redeem; yet the actual amount of incumbrances, to wit, the precise amount due to the defendants Richardson and Jackson, is as necessary to be known, as if it were in form a bill to redeem; because the amount of that incumbrance, by force of the defendant's contract, fixes the amount which he is to pay for

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the equity of redemption. We have therefore thought it would facilitate the ultimate decision of the case, to express an opinion upon this question, which has been fully argued by the counsel.

We are of opinion, that the agreement of Bugbee, to appropriate the rents, to be received by the defendants, towards their building contract, could not by its own force bind the estate. So long as he had a disposing power, so long as he himself had a power to receive the rents, that is, before his insolvency, if the defendants had received any such rent and appropriated it, it would have enured by way of payment, and been available. But no rents had been received by them, under the agreement. When the debtor became insolvent, legal proceedings were instituted, under which all his property and rights to property passed to his assignee for his general creditors. It vested in his assignee his right in equity of redeeming the house, the reversion, if it was then let, and all the rents which accrued and became payable; but as no rent was then payable, none could be appropriated under the agreement, because the disposing power of the debtor over it was then gone.

The result will be that the defendants must be deemed to have received such rent as mortgagees in possession, the only capacity in which they could rightfully receive them, and must account for them on the redemption of the mortgages, towards the interest and principal of the mortgages, upon an account to be stated, in the mode provided for stating the account and the amount due on a mortgage on redemption.

The case, therefore, may be referred to a master, to take an account and report what is the amount of incumbrance held by the defendants Richardson and Jackson on the estate, subject to which the defendant is to pay pursuant to his contract, and accept his deed; unless such amount can be agreed on by the parties.

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The City of Boston *vs.* The Inhabitants of Weymouth.

In order to prove a settlement under the twelfth mode provided by the law (St. 1793, *c.* 34, § 2; Rev. Sts. *c.* 45, § 1, *cl.* 12,) by a residence and the payment of taxes in the town where the settlement was alleged to be, an original document preserved amongst the records of the town, and purporting to be an assessment of taxes for the year 1798, was produced in evidence, from which it appeared, that taxes to the amount of $3·03 were assessed in that year, upon the individual in question, for his poll and estate; and it also appeared in evidence, that the entry of these taxes on the bill of assessment had been erased by a line drawn through it; and that the collector for the year 1798 had been allowed a credit with the treasurer of the town for a discount of the said taxes; it was held, that whether the production of the bill of assessment raised any presumption of the payment of the taxes so assessed or not, the circumstances stated above were competent evidence to prove that the taxes in question were not in fact paid.

An ancient book, kept among the records of a town, purporting to be the "selectmen's book of accounts with the treasury of the town," is admissible in evidence of the facts therein stated; and, where the selectmen were at the same time assessors, an entry, in such book, of a credit, by an order in favor of the collector for a discount of a particular individual's taxes, was held to be evidence of an abatement of the tax of such individual.

This action was brought to recover compensation for the support of Henry Pittee, in the house of industry in the city of Boston, from July 17th to September 5th, 1846, and for supplies furnished to Sarah Pittee, during that and the following year, by the plaintiffs. The case was submitted to the court of common pleas upon an agreed statement of facts, and came to this court by appeal. The court were to decide upon the admissibility and competency of the evidence, and to draw such inferences from the facts as a jury might draw.

The paupers, Henry and Sarah Pittee, never having gained a settlement in their own right, had the settlement of their ancestor, Nathaniel Pittee; which, it was admitted, was in the town of Weymouth, unless he had subsequently acquired a settlement in the town of Hingham, to which he removed from Weymouth, about the year 1789, being then a citizen of this state, and of the age of twenty-one years; and where he afterwards resided continuously and uninterruptedly, for more than twenty-five years, until he removed to Boston, where he remained until his death.

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The ground of the alleged change of settlement of Nahaniel Pittee from Weymouth to Hingham, was a residence f ten years, and the payment of taxes for five years within hat time, in the last-named town, under the twelfth mode of settlement established by the act of 1793, *c.* 34, § 2, passed on the 11th of February, 1794, by which it was provided, that any person, being a citizen of the state, and of the age of twenty-one years, who should thereafter reside in any town or district within the commonwealth, for the space of ten years together, and pay all state, county, town or district taxes, duly assessed on such person's poll or estate, for any five years within said time, should thereby gain a settlement in such town or district.

It appeared from certain books, denominated "bills of assessments," which were found among the records of the town of Hingham, that Nathaniel Pittee was assessed in Hingham for his poll and personal estate from the year 1790 to the year 1798, both inclusive; but there were no receipts to be found for these taxes, nor was there any other evidence, either way, except in regard to the tax for 1798, as to the payment of them by Pittee, or by any other person for him.

In regard to the taxes for 1798, amounting to $4·03, which sum was made up of town and state taxes, $3·03, and "dog" tax, $1, it appeared that the entry of them on the bill of assessment had been erased by a line drawn through it. It also appeared, that there was in the office of the clerk of the town of Hingham, a book called the "selectmen's book of accounts with the treasury of the town of Hingham," in which there was an entry as follows: "1799, April. By an order in favor of Moses Whiton, collector, for discount of Nathaniel Pittee's taxes for 1798." The selectmen of Hingham, for the years 1798 and 1799, were also assessors, and all the entries in the "selectmen's books" for these years were in the handwriting of some one of those officers. There was no other book to be found containing abatements of taxes; and all the town officers of Hingham for the year 1798 were dead. It was agreed, also, that there were no

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collector's books to be found for the years in question, or any evidence of the payment of any person's taxes during those years, or any books or papers relating to Pittee's settlement, except as above mentioned.

The dog tax of $1, mentioned in the bill of assessments for the year 1798, as one of the items of Nathaniel Pittee's taxes for that year, was assessed upon all persons who were the owners or keepers of dogs, pursuant to the provisions of the act of 1797, *c.* 53,* passed February 19th, 1798, which was in force on the 1st of May, 1798, when the taxes for that year were assessed, but was repealed on the 19th of February, 1799, by the act of 1798, *c.* 54. The former act contained an express provision, that no person should "at any time acquire a privilege of habitancy, or right of voting in any town, district or plantation meeting, in consequence of paying any tax" imposed by virtue of the act.

The last-named act repealed the former, except as to the prosecutions for injuries, and the collection of taxes.

P. W. Chandler, city solicitor, for the plaintiffs.

J. J. Clarke, for the defendants.

Dewey, J. It is agreed that the settlement of Nathaniel Pittee, the ancestor of the paupers in question, was formerly in Weymouth, and that this must fix their settlement, unless the ancestor afterwards acquired a new settlement in the town of Hingham. A previous settlement in Weymouth being admitted, the burden is on the defendants to show a change of settlement.

The settlement in Hingham is attempted to be established under the twelfth mode provided in the statute of 1793, *c.* 34,

* This statute, entitled "An act to lessen the dangerous evils of canine madness and other injuries occasioned by dogs," authorized the imposition of an annual tax of $1 for every dog owned or kept in Massachusetts proper, (this part of the act not extending to the district of Maine); and also contained provisions to prevent injuries from mischievous dogs, which were substantially reenacted in the repealing act of the next year. The act of 1797 was published with the laws of the political year 1797–8; but is not known to be contained in any collection of the general laws.

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§ 2, by residing in a town ten years consecutively, and paying all state, county and town taxes assessed therein on the party for any five years during that time. The defendants attempt to show the payment of such taxes annually from the year 1794 to the year 1798 inclusive. But the question of payment arises more particularly as to the tax of 1798. The defendants exhibit an original document, purporting to be an assessment of taxes for that year upon Nathaniel Pittee of $4·03, which makes a *prima facie* case of an assessment of such a tax. The next inquiry is, has the tax thus assessed been paid? Does the production of the assessment of the tax of 1798, and a similar assessment for several previous years, furnish competent evidence of the payment of such tax? It is argued, on behalf of the defendants, that this must be so held; otherwise such payments never could be established, where the transactions were ancient. If this were so, it would by no means follow, that we should sanction the sufficiency of such evidence, to sustain the burden of showing a tax not only duly assessed but also duly paid. But we think, that where the original tax bill can be produced and shown to have been in the hands of a collector, some further additional facts are usually apparent upon the face of the bill, in the nature of memoranda or signs, indicating the payment of such as are actually paid. We are not prepared to say, that the mere production of an assessment roll, or tax bill, although purporting to have been made more than fifty years since, unaccompanied with any proof beyond the mere assessment, raises any presumption of the payment of the tax of any particular individual whose name is borne on that roll. It is true, that the great majority of persons pay the taxes assessed upon them; but there are at all times, and upon every assessment roll, the names of persons who do not pay the taxes assessed to them, by reason of poverty, or for some other cause. This would be quite too loose and unsatisfactory a species of evidence to rely upon to establish the fact of actual payment, which is required here.

But the present case does not demand of us any expression

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of opinion upon this isolated fact of a tax upon Nathaniel Pittee, inasmuch as the plaintiffs have introduced evidence tending to show that the tax of 1798 was not in fact paid. This leads us to the question raised by the defendants as to the competency of the particular species of evidence offered by the plaintiffs upon that point.

1. As to the book purporting to be the selectmen's book, was this competent evidence? Upon inspecting this book, it purports to be "the selectmen's book of accounts with the treasury of the town of Hingham." The selectmen were the agents of the town in keeping their accounts with their treasurer. The proposed evidence is an entry upon this book crediting the town treasurer, "by an order in favor of Moses Whiton, collector, for discount of Nathaniel Pittee's taxes for 1798, $3·03." This evidence was, in our opinion, competent. It would be so, as containing an entry on the books of the town, adverse to the interest of the town, as this credit to their treasurer would be. This being also an ancient transaction, and the book being duly shown to have come from the custody of the town by their agents, the selectmen, who also acted in the capacity of assessors in the year this entry was made, the entry is evidence proper to be considered in the case. This evidence tends to show, that the selectmen, acting as assessors, had abated in part the tax assessed upon Nathaniel Pittee for the year 1798, and that the same was not paid by him, or by any one on his behalf. The assessment roll contains on its face marks and erasures confirmatory of and tending to establish the fact, that this tax was not paid. Of the whole amount of $4·03, it thus appears that $3·03 was abated. This leaves $1, which is supposed to be the amount of a dog tax, assessed upon such of the inhabitants as were owners of dogs, under the provisions of the statute of 1797, *c.* 53, but which was repealed by the statute of 1798, *c.* 54. The statute authorizing the tax on dogs was in force on the 1st of May, 1798, when this tax was assessed. But such dog tax, if assessed upon Nathaniel Pittee, in May, 1798, and subsequently paid by him, could not have any effect in establishing his settlement in Hingham

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By the sixth section of the act of 1797, *c.* 53, it is in direct terms provided, that such assessment of a dog tax, and the payment thereof, by the person thus assessed, shall not affect the settlement of such person, as a pauper. The abatement of all but the dog tax in 1798, and the omission to tax Pittee after 1798, tend to show, that the tax of 1798 was not paid, and satisfactorily rebut any presumption which might be supposed to arise from the mere proof of an assessment of a tax, if such assessment would authorize any such presumption of payment of a tax. The real question however is as to the result of all the evidence upon this point of the payment of the tax of 1798, remembering that the defendants have the burden of proof. Looking at all the evidence, and drawing all proper inferences therefrom, in our opinion, the evidence is insufficient to establish the payment of the tax of 1798, by Nathaniel Pittee. Such being the case, the defendants fail to show a settlement of the pauper in Hingham. The result is, therefore, that judgment must be entered for the plaintiffs.

James Huckins *vs.* The City of Boston.

The owner of goods, wares and merchandise, living in one town, and doing business in another, where he has a privilege in a counting-room, and has goods stored, but does not otherwise hire or occupy any store, shop, or wharf, is not liable, within the provisions of the Rev. Sts. *c.* 7, § 10, *cl.* 1, and *St. 1839, *c.* 139, § 1, to taxation for such goods, in the town where he so does his business.**

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This was an action of assumpsit to recover the sum of $90, being the amount of a tax assessed on the plaintiff in the year 1846, by the assessors of the city of Boston, for his "personal estate, income, &c.," together with the costs thereon, and interest from the 8th of January, 1847, when the same was paid under protest; and also the further sum of $90, assessed on the plaintiff in the year 1847 by the assessors of the city of Boston, for "personal estate, income, &c.," together with costs, and interest from the time when the tax was paid under protest.

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The case was submitted to the court upon the following agreed statement of facts:—

The plaintiff, for eleven years previously, including the years 1846 and 1847, had been an inhabitant of the city of Roxbury, and resided therein, and for all that time had been taxed in Roxbury for his poll, and for his real and personal estate and income, and had paid the same. The tax for 1846 was for the plaintiff's "poll, real estate, personal estate and income," and amounted to $107·50. The tax for 1847, assessed in like manner, amounted to $150·84.

The plaintiff had had no goods, wares or merchandise, stock in trade, or stock employed in the business of any of the mechanic arts, or in manufacturing, and had not owned, hired or occupied any store, shop or wharf, in the city of Boston, for the eleven years previous. During this period, he was engaged in manufacturing starch in Roxbury, and was interested as part owner in sundry vessels, which he sometimes chartered, and at others freighted, sometimes in Boston, and at other times in New York, and other ports.

The plaintiff, together with Howes and Crowell, occupied a counting-room on Commercial wharf, in Boston, where he transacted his general business, and where he usually was in the business hours of every week day. He paid Howes and Crowell, for the use of the privilege in the counting-room with them, from time to time, such a rent as they determined was right, amounting usually to $25 or $30 a year. His books of account were kept in this counting-room, and there he received his bank notices. He made his deposits in Boston, and all his ship and general business letters were directed to him at Boston.

The starch manufactured by the plaintiff in Roxbury was generally sent directly from the factory to his agents in Boston, Fall River, Providence and other places; and sometimes portions of it were sent to Boston, to persons to whom he had sold it, and, if more was sent in than was sold, the overplus was stored. The plaintiff did not himself sell all the starch which was sent from his factory to Boston; but he had an agent or agents there on Central wharf, who kept a supply

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and sold on commission as much or more than he did. When the agents were out and wished for more, they sent an order therefor to the plaintiff at his counting-room, or through the post office, directed to him at Boston.

The plaintiff visited his manufactory at Roxbury whenever occasion required, and gave orders as to the operations there; and when goods were sent from the factory to agents, a memorandum of the transaction was made, which was brought into Boston and entered on his books.

From the 1st of May, 1846, to the 1st of May, 1847, the plaintiff's sales of starch amounted to $15,221·68, of which the amount sold by him and sent by railroad from the factory and not to Boston, was $3760·47; the amount sold and sent from the factory to Boston was $320·97; and the amount sold by agents at sundry places was $11,140·24.

When the plaintiff loaded his vessels himself, he bought goods which were carried from the stores of the sellers, and put on board the vessel, and when he received goods from abroad, on freight or adventure, he sometimes sold and delivered them from the vessel. Whenever he landed the goods, he had them stored, sometimes at one place and then at another, and paid for storing each and every lot. When he had any starch or other articles temporarily stored in the store connected with the counting-room which he partly occupied, or in any other store, and any one wished to see such articles, he opened the barrel or box containing them, for that purpose, but he never kept samples.

The defendants could prove, and if such evidence was competent or admissible, it was to be taken as proved and agreed, but not otherwise, that, for the last eight years, the name of the plaintiff had been inserted in the Boston Directory, as of No. 35 Commercial wharf. But this insertion was made without the plaintiff's request, or permission, other than suffering it to remain without objection.

J. J. Clarke, for the plaintiff.

P. W. Chandler, city solicitor, for the defendants.

Fletcher, J. This is an action of assumpsit to recover the amount of taxes, assessed to the plaintiff by the assessors

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of the city of Boston, for the years 1846 and 1847, and paid by him under protest, denying that the taxes were lawfully assessed. There is no controversy as to the amount; but the question is, whether the plaintiff was by law liable to be taxed, at all, or in any sum, in the city of Boston, in the years 1846 and 1847.

It is admitted, that, on the 1st day of May, in each of those years, and for several years before, the plaintiff was an inhabitant of and resided in the city of Roxbury, and was there taxed for his poll, and for his real and personal estate and income, and paid the same. The ground, upon which the city of Boston claims the right to assess the taxes in question upon the plaintiff, is, that he had goods, merchandise and stock in trade in that city, at the time of the assessment, so situated and under such circumstances, as to be legally liable there to assessment. The form of the assessment is on his "personal estate, income, &c." This must in form at least be incorrect; as the plaintiff was legally liable to be taxed for income in Roxbury, where he was an inhabitant, and where he was in fact so taxed and paid the amount assessed upon him. He could not therefore be rightfully taxed a second time for the same thing in Boston. But it is understood, that the assessments in Boston were in fact only on goods and merchandise there; and it would seem advisable, therefore, that the form of the assessment should be corrected; as upon the face of it, it would appear not to be warranted by law.

The city of Boston claim the right to make these assessments on the goods of the plaintiff, by virtue of the provisions of the Rev. Sts. *c.* 7, § 10, *cl.* 1, and of the statute of 1839, *c.* 139, § 1. The former provides, that "All goods, wares and merchandise, or any other stock in trade, including stock employed in the business of any of the mechanic arts, in towns within the state, other than where the owners reside, shall be taxed in those towns, if the owners hire or occupy stores, shops or wharves therein, and shall not be taxable where the owners reside." The statute of 1839 declares, that "All stocks in trade, including stock employed in

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the business of manufacturing, or of any of the mechanic arts, in towns within the state, other than where the owners reside, shall be taxed in those towns, if the owners hire or occupy manufactories, stores, shops or wharves therein, whether the said stocks in trade, or the goods, wares and merchandise, or other property composing or forming a part of the same, are within said towns on the 1st day of May, of the year when the tax is made, or elsewhere." The statute of 1839 enlarges the former provision as to the time when the goods must be found within a town other than that in which the owner resides, in order to be liable to be taxed in the former town; not confining it to the 1st of May as in the prior statute.

The present case shows, that the plaintiff had a privilege in a counting-room in Boston, where he kept his books and received notices and letters; that he made his deposits in Boston; and, in fact, it appears quite fully, that his place for the transaction and management of his general business was in Boston. So, also, it appears that he was interested in vessels sailing from Boston, and returning there with cargoes; that he received goods by those vessels, which he procured to be stored at different places in Boston; and that he had on storage in Boston some of the products of his factory other than those in the hands and possession of his agents, which, of course, were stored by him. It would seem, also, (but upon this point the statement of facts is not very distinct or certain), that the plaintiff, though he did not keep and exhibit samples, yet, to some extent and in some mode, exhibited and made sales of the products of his factory, and of other goods which he received by his vessels, and which were on storage in Boston.

If, therefore, the law had provided, that any one, who transacted his business in a town other than that in which he lived, though he was an inhabitant of and liable to taxation in another place, might be taxed in the place in which he transacted his business; or if it had provided, that the owner of goods or merchandise, or stock in trade, which might under any circumstances be found in a town other

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than that in which he lived, might be taxed there, the plaintiff, upon the facts stated, might very probably have been found liable to be taxed in Boston. But the liability of a person to taxation in a town other than that in which he lives is not made by the statute to depend on the fact of his doing business in such other town; or on the general fact that he has goods in such other town.

But, by the statute, goods, wares and merchandise, and other stock in trade, are taxable in the town where they may be, other than the town where the owner resides, only in the case, and upon the express condition, that the owner hires or occupies stores, shops, or wharves in such other town, in which he does not reside. In order, therefore, that a town may rightfully tax goods found within it belonging to an owner, who is an inhabitant of and liable to taxation in another town, it must appear, that the owner of such goods hires or occupies stores, shops or wharves in the town where the goods may be found.

The plaintiff, in the present case, was an inhabitant of the city of Roxbury, and he had goods in Boston; but to render him liable to be taxed in Boston for those goods, it must further appear, that he hired or occupied stores, shops or wharves in Boston. This hiring or occupying stores, shops or wharves, the statute expressly makes the ground of liability to taxation in such cases. There was a manifest propriety in having the specific grounds of liability expressly stated and defined in the statute; as it was not the purpose of the statute, to have all goods found in towns other than those in which the owner lives liable to be taxed in the towns in which they might be found.

It is manifest from the statement of facts, in this case, that the plaintiff did not hire any store, shop or wharf in the city of Boston. He had a privilege in a counting-room only for the transaction of his business; what goods he had in Boston, were in stores or shops, or on wharves hired or occupied by others and not by himself. But it does not appear, that the plaintiff himself hired or occupied any store, shop or wharf in the city of Boston, and, of course, therefore,

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was not liable to taxation there. The result is, that the plaintiff must have judgment for the sum paid by him and interest from the time of payment.

TIMOTHY HILL & Wife *vs.* CALEB W. SAYLES.

The verdict of a sheriff's jury having restricted a mill owner from keeping up his dam and flowing the land above during certain months in the year, he is liable to the land owner, in an action at common law, for flowing the land during those months; although he causes such flowing through a canal cut by him, by the side of the stream, after the verdict, instead of causing the water to flow back in the natural stream, as it flowed before the verdict: And it is no defence to such action to show, that the flowing complained of was not occasioned by the particular structure, which created the obstruction, at the time of the trial by the sheriff's jury, and which the jury had in view in giving their verdict, but a different one; that the new channel, dug by the defendant, was of greater capacity, and would carry off the water more freely and fully from the plaintiff's land, than the old channel, and was kept open during the months specified in the verdict; or, that since the verdict of the jury, the defendant had added a large amount of machinery to his mills.

THIS was an action of trespass on the case for flowing a certain tract of land in Wrentham, described in the declaration, from the 1st day of May, 1846, to the 1st day of November in the same year; and was tried before *Fletcher*, J., in this court.

The declaration contained two counts, the first of which set forth the plaintiff's ownership of the land, the damming up and obstruction by the defendant of the flow of the water of a brook running through the land described, and the consequent flowing and injury of the plaintiff's land. The second count set forth, in addition, the proceedings on a complaint, made by the plaintiffs against the defendant, under the mill act; the verdict of a sheriff's jury, restricting the defendant from keeping up his mill dam from the 1st day of May to the 1st day of November in each year; the acceptance of the verdict, and judgment thereon; and alleged that the defendant had kept up his dam and flowed the plaintiff's land during these months. The two counts were precisely similar in form to those inserted in the declaration

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in a former case between the same parties, for flowing the same tract of land in 1845, which are given at length in the report of that case in 12 Met. 143.

The defendant pleaded the general issue, and filed a specification of defence, alleging, that he had mills on the stream below the land of the plaintiffs, and had a right to dam up the waters of the stream to create a head to drive his mills; that he had conformed to the verdict of the sheriff's jury mentioned in the second count of the plaintiffs' declaration; that since the verdict of the sheriff's jury in 1843, he had added a large amount of machinery to the quantity then in his mill, and that a greater head of water was required to drive his machinery, and that he had a right to keep up the water for that purpose.

It was proved or admitted, that upon the stream contiguous to the plaintiffs' land, there was an ancient dam, through which the water was accustomed to flow; and that between the said dam and the defendant's factory dam, there was another dam, with gates in it, which could be opened and closed at pleasure; that the factory dam made the mill pond; that after the finding of the verdict set forth in the plaintiffs' declaration, the passage way in the dam first mentioned, through which the water of the stream had been accustomed to flow, was closed for the purpose of making a reservoir on the defendant's land below said dam; and the water of the stream was diverted from its natural channel, and carried in a new channel around and above the upper dam, and through the defendant's own land, into the more easterly part of the mill pond; that the gates of the second dam, after the water of the stream had been obstructed from flowing through the first-mentioned dam, as aforesaid, were kept closed for the purpose of preventing the water of the reservoir from flowing into the mill pond; the mill pond thereafterwards being ordinarily supplied by the waters of the stream which flowed through the new channel.

The defendant offered to prove, that the factory dam remained as it was in 1843, when the jury rendered their verdict, and had at all times been kept closed, which was

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necessary for the operation of the mills; that the flowing upon the plaintiffs' meadow was caused by the factory dam only, which flowed the water back through the new trench upon the meadow; that at the trial before the sheriff's jury, in 1843, mentioned in the second count, the plaintiffs expressly stated to the jury, that they made no complaint against the factory dam, but that they complained only of the middle dam; that at the time of the hearing before the jury, no evidence was offered respecting any other dam, except the middle dam, and that the jury viewed no other dam; that the jurors, (whom he proposed to call as witnesses), at the time of rendering their verdict, had in view no other dam but the middle dam, and would not have signed the verdict, if they had supposed that it extended to the factory dam; that the new channel dug by the defendant was of greater capacity, and would carry off the water more fully and freely from the meadow, than the old channel of the stream, and passed through a part of the reservoir or middle dam, and having been kept open and unclosed from the 1st of May to the 1st of November, in each year, this was a compliance with the verdict of the jury set forth in the second count of the plaintiffs' declaration, ordering the dam to be kept open and unclosed from the 1st day of May to the 1st day of November, in each year; and, that he had added a large amount of machinery to his mills, since the verdict of the jury in November, 1843.

All the above evidence was rejected by the judge, who instructed the jury, that if they were satisfied that there was a dam erected by the defendant across the brook in question; that the dam had not been kept open and unclosed from May 1st to November 1st; and that in consequence thereof, the plaintiffs' land had been flowed; the plaintiffs were entitled to maintain this action. Whereupon a verdict was returned for the plaintiffs, subject to the opinion of the whole court. If the evidence was properly rejected, and the instructions correct, then judgment is to be rendered on the verdict; otherwise the verdict is to be set aside, and a new trial granted.

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J. J. Clarke, for the defendant. 1. The defendant had a right to flow by Rev. Sts. *c.* 116, §§ 1, 30, *et seq.*; *Stowell* v. *Flagg*, 11 Mass. 364; *Charles* v. *Monson & Brimfield Man. Co.* 17 Pick. 70; *Baird* v. *Wells*, 22 Pick. 312; *Hill* v. *Sayles*, 12 Met. 142. The only remedy in this case is by complaint. *Wolcott W. Man. Co.* v. *Upham*, 5 Pick. 292; *Fiske* v. *Framingham Man. Co.* 12 Pick. 68. 2. The complaint, on which the verdict of the sheriff's jury was rendered, speaks of "a" dam, whereas there were three dams; the complaint specifies no particular dam, and affords no way of telling to which dam the proceedings related, nor which caused the flowing. The evidence offered to show which dam the jury were called to view, and that the factory dam caused the injury, was admissible. *Eastman* v. *Cooper*, 15 Pick. 276, 279, 286. 3. The defendant also offered to prove that he had increased his machinery. The remedy in such case is by a new complaint under the statute. *Johnson* v. *Kittredge*, 17 Mass. 76; *Leonard* v. *Schenck*, 3 Met. 357; Rev. Sts. *c.* 116, § 1; *Baird* v. *Wells*, 22 Pick. 312.

E. Wilkinson, for the plaintiffs.

Shaw, C. J. It appears to the court, that the questions arising in this action were settled in the case between the same parties, reported in 12 Met. 142, and that this is an action for the continuance of the same nuisance.

The point decided, upon the complaint of these parties, under the mill act, was, that the dam raised by the defendant, for a head of water for working his mill, should not be kept up so as to flow the complainants' meadow, during a certain part of each year. This was within the jurisdiction of the jury by statute, and their finding is conclusive.

It is not any particular structure of stone, wood, or earth, to be kept open and unclosed, to which such a judgment applies; it applies to a structure or contrivance, made to raise a head of water by obstructing the natural course of a stream, the effect of which is to immerse the complainants' meadow during summer.

The attempt of the defendant was to show that a particular structure, called the middle dam, was that which

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obstructed the flow of the water, when the sheriff's jury went out; that it was to this, and not to the factory dam, that the judgment referred. But this evidence, we think, was rightly rejected. If, when that dam was removed or kept open, the complainants' land was drained of the water, raised by raising a head of water for the mill, then the defendant had substantially complied with the judgment, and the action at common law would not lie. But if the defendant's arrangements were, that he could keep open and unclosed the particular dam, which caused the obstruction, and flooded the complainants' meadow, and at the same time, by using another dam and closing other gates, he could keep up the water to the same height, and flow the complainants' meadow, the whole year, as before; then it was an illusory and not a substantial or legal compliance with the judgment. It is stated, that the factory dam makes the mill pond; if by this is understood that this dam raises the head of water for the mill, and also floods the complainants' meadow, then it is the dam contemplated in the judgment, and this conclusion could not be affected by the evidence offered, tending to show that the jury had another in view, in finding the verdict, on which the judgment was rendered.

Judgment on the verdict for the plaintiff.

The Inhabitants of Bellingham *vs.* The Inhabitants of West Boylston.

Where a minister, who has been regularly ordained in one town, is afterwards settled in another, as a pastor, with the full character, rights and duties of a pastor, but without any new ordination or ceremony of induction, or for a limited time, as for a year, he will, by such settlement as a minister, acquire a settlement as a pauper, within the statute of 1793, *c.* 34, § 2, *cl.* 7, (Rev. Sts. *c.* 45, § 1, *cl.* 7,) in the latter town.

This action was brought to recover the expenses incurred by the plaintiffs, in the support of Lorenzo O. Lovell, a pauper, in the State Lunatic Hospital, and was submitted to the

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court of common pleas, from whence it came to this court by appeal, upon an agreed statement of facts.

The expenses sued for were incurred as set forth in the declaration, and the pauper never had a legal settlement in the town of Bellingham. The pauper was settled and ordained as the stated minister of the Baptist society, so called and known in West Boylston, in the year 1835, and remained in that office during a part of a year. This society was established by the organization of fifty-one persons as a Baptist church in West Boylston, on the 23d of June, 1818, by an ecclesiastical council duly convened for that purpose. In the records of this society, which, previous to the 6th of April, 1824, had been lost or destroyed, minutes of the acts and doings of the same, at meetings held almost every month from the time of its organization until after the settlement of the pauper, as a minister, in 1835, were duly entered. Members of this church, in connection with other individuals, as a voluntary, unincorporated society, erected a meeting-house on land conveyed to them for that purpose, and possessed a parsonage-house in West Boylston, and had maintained public worship there, since the establishment of the church.

On the 6th of April, 1824, the members of the society, in pursuance of a warrant from a justice of the peace, held a meeting for the purpose of organizing under the statute of 1823, *c.* 106, passed on the 16th of February, 1824; and, from the year 1824, until after the year 1835, meetings of the society, called by posting notices on their meeting-house, agreeably to a vote passed at the meeting held on the 6th of April, 1824, were held on the first Tuesday of March, annually, and at other times; at which meetings the usual parish officers were chosen, money raised for the support of public worship, and other usual parish business transacted.

On the 21st of November, 1835, the pauper resigned his ministerial office in West Boylston; and, on the 11th of January, 1836, the Village Baptist society, an incorporated religious society in the town of Fitchburg, at a meeting regularly convened, voted to choose Lorenzo O. Lovell to be their pastor, with a salary of $500, conditionally. On the 30th of

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January, the church connected with the society, at a regular meeting, concurred in the choice.

The pauper immediately entered upon the discharge of the duties of a minister and pastor over the last-mentioned society and church, and statedly performed those duties until the 10th of February, 1837, when he resigned his pastoral office by a written communication to the church; upon which the church, on the 15th of February, 1837, voted that "this church no longer recognize the Rev. Lorenzo O. Lovell as their pastor." Previous to this proceeding, a meeting of the society was called to be held on the 3d of November, 1836, for the purpose, among others, of seeing "what measures the society will take for the continuance of preaching; the yearly services of our pastor, as by the contract, being nearly at a close." This meeting was adjourned from the 3d to the 11th of November, 1836, when the society voted, "that the Rev. Lorenzo O. Lovell may continue his services till the annual meeting of the society in March, 1837."

The doings of the church, in relation to this matter, were recorded as follows: "Church met Feb. 4th, 1837, to confer relative to requesting Lorenzo O. Lovell, our pastor, to labor with us another year." The consideration of this subject was adjourned to the 10th of February, 1837, when the pauper resigned, by the written communication to the church of that date, before referred to, and the church there afterwards, on the 15th of February, 1837, passed the vote of that date before recited.

There was no formal induction into the ministerial office of the pauper over the Village Baptist society in Fitchburg, by installation or other religious ceremony; and it was agreed, that the usages of the Baptist denomination do not require, when a minister has been once ordained, that he should be installed on a new settlement afterwards; it is sometimes done, and sometimes omitted; being left to the option of the church or of the minister.

S. B. Walcott, for the plaintiffs.

C. Allen, for the defendants.

Fletcher, J. It is not necessary to decide whether or not

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the pauper acquired a settlement in West Boylston, as the court are of opinion, that such settlement, if gained, was lost by his subsequently acquiring a settlement in Fitchburg.

By the seventh mode mentioned in the statute of 1793, *c.* 34, § 2, it is provided, that all settled ordained ministers of the gospel shall be deemed to be legally settled in the towns wherein they are or may be settled and ordained; and a similar provision in the Rev. Sts. *c.* 45, § 1, *cl.* 7, is as follows: "Every settled ordained minister of the gospel shall be deemed to have acquired a legal settlement in the town wherein he is or may be settled as a minister." Under either of the above statutes, a minister who had once been regularly ordained, in a particular town, and who should afterwards be settled in another town as a pastor, with the full character, rights and duties of a pastor, though without a new ordination, or ceremony of induction, and though for a limited time, as for a year, would gain a settlement in the town wherein he should be so settled. It appears by the facts agreed, that the pauper, who had become insane, was regularly settled and ordained as the stated minister of the Baptist society in West Boylston. After he left West Boylston, the Village Baptist society, an incorporated religious society in the town of Fitchburg, by a formal act of the society, chose him to be their pastor, and he immediately entered upon the discharge of the duties of a minister and pastor, over the last-mentioned society and church. There was, to be sure, no new ordination, nor was it necessary that there should be. There was evidence tending to show, and it was maintained in the argument, that he was originally engaged by this society, only for a year. But that his engagement was for a limited time, if it were so, is wholly immaterial. The facts show, clearly and conclusively, that he was duly instituted pastor over the church and society in Fitchburg; that he was fully inducted into that office, with all its rights and duties; and by being thus settled as minister and pastor, by force of the statutes, he acquired a legal settlement in Fitchburg.

The settlement in Fitchburg of course exempts the town of West Boylston from liability, and judgment must be rendered for the defendants.

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The Inhabitants of Randolph *vs.* The Inhabitants of Easton.

The assessment of a tax on real estate to the occupant, and the payment of the same by him, not as of his own estate, but in right of another, are a sufficient assessment and payment of a tax, within the twelfth mode provided by statute (St. 1793, c. 34, § 2; Rev. Sts. c. 45, § 1,) for acquiring a settlement as a pauper in the town where such party resides.

This was an action of assumpsit to recover for the support of one Jonas Howard, a pauper, whose settlement was alleged to be in the town of Easton, on the ground that he had resided therein ten years consecutively, since the year 1818, and had paid all taxes duly assessed upon him there, for five years within that period, according to the twelfth mode specified in the statute of 1793, *c.* 34, § 2.

At the trial, before *Byington*, J., in the court of common pleas, it was in evidence on the part of the plaintiffs, that in April, 1818, Jonas Howard, the pauper, removed with his family to Easton, where he occupied a small house and lot of land which he hired of one Daily; that about a year after the pauper went to Easton, Daily sold the house and land which the pauper occupied to one Edwin Howard and one Benjamin D. Howard, the former of whom shortly after conveyed his undivided half to the latter, who, on the 14th of January, 1822, conveyed the estate to one Nathan Packard; that whilst the Howards were the owners of the estate, the pauper occupied the same as a tenant at will; that, on the 7th of April, 1824, the pauper made a release and quitclaim of the said estate to one Elijah Packard; but it did not appear, that any conveyance of the estate was ever made by Nathan Packard or his heirs or devisees, previous to the time of this release; and that the pauper continued in the possession and occupation of the premises until December, 1829.

The plaintiffs, to prove that the pauper was taxed in Easton for five years during the period of his residence there, produced the valuation and tax lists of that town for the years 1824 to 1829 both inclusive, from which it appeared, that for

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the years 1824 and 1825, the house and land occupied by the pauper were taxed to "Jonas Howard, in right of the heirs of Nathan Packard, deceased," and for the four following years to "Jonas Howard, in right of Elijah Howard."

The defendants contended that the pauper had no legal interest in the house and land, for which he was taxed, and that he was not assessed for the same as his own; but that the assessment for the years 1824 and 1825 was substantially and in legal effect an assessment of the house and lot on the property of Nathan Packard's heirs, and for the other four years on the property of Elijah Packard; that the question, whether the assessment for the said house and land was as the pauper's property, or as that of the heirs of Nathan Packard or as Elijah Packard's, was a question of law, to be determined only by the reading of the valuation and tax lists, and upon the face thereof; and that parol testimony was inadmissible to explain the valuation and tax lists, or to show that the assessment was for the house and land on the property of Jonas Howard.

But the presiding judge, declining so to instruct the jury, instructed them, that if they were satisfied upon the evidence, that the pauper lived in the town of Easton for ten years consecutively; that he was taxed therein as set forth in the tax lists produced in evidence, and paid the taxes; and that he lived upon the premises taxed, during all the years he was taxed, by the permission of the owner, and occupied the estate as his tenant; then he was so taxed as to acquire a settlement in Easton by residence and taxation.

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

E. Ames, for the defendants.

A. Prescott, for the plaintiffs.

By the court. The court concur in opinion with the judge who tried the cause.

The pauper was in the occupation of the estate during the whole six years, and was rightfully taxed for it. It was competent then, as now, to set the tax on real estate to the person in the occupation of it; the tax was his tax; and he was

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bound to pay it. *St.* 1785, *c.* 70, §§ 14, 15. It was not the less his tax, a tax which he was liable to pay, and which he did pay, because the name of another person, as owner, was mentioned in the tax books.

It was argued, that to gain a settlement in the twelfth mode mentioned in the statute of 1793, *c.* 34, § 2, relied upon in the present case, the pauper must be assessed and must pay a tax on the property as his own. This point was directly before the court and decided otherwise in the case of *Sudbury* v. *Stow*, 13 Mass. 462, and was again considered and affirmed in the case of *Templeton* v. *Sterling*, 15 Mass. 253, in which the distinction was clearly taken, and accurately defined, between what is requisite, under the statute of 1793, *c.* 34, § 2, (Rev. Sts. *c.* 45, § 1,) to gain a settlement by the twelfth and by the fifth mode prescribed therein. In the present case, the pauper resided more than ten years together in Easton, paid taxes duly assessed on estate in his occupation for five years and more, within that time, and thereby acquired a settlement in Easton.

Wesley P. Balch *vs.* Charles Onion.

If the indorsement of a note, payable on time, contains no date, and there is no evidence to show when it was made, the presumption is, that the transfer of the note was made at or soon after its date.

Where the promisor of a note, in the hands of an indorsee, by an indorsement without date, gave the latter a mortgage to secure the payment of all sums of money then due to him from the mortgagor, and it did not appear that any other sum was due than the said note, it was held, that the presumption was, that the transfer of the note took place before the making of the mortgage.

If the maker of a promissory note, which has been transferred by an indorsement without date, give the indorsee a mortgage, after six and within twenty years from the time of payment of the note, to secure the payment thereof, the mortgagor cannot redeem the estate mortgaged, without paying the amount due on the note.

This was a real action to recover possession of land in Medfield, mortgaged by the tenant to the demandant, by a mortgage deed dated the 10th of June, 1840. The only questions submitted to the court arose upon the report of

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James Richardson, esquire, one of the masters in chancery for this county, to whom it was referred, as an auditor, to ascertain and report what sum, if any, was justly and equitably due from the mortgagor to the mortgagee. The auditor reported substantially as follows: —

The condition of the mortgage deed provided, that the same should be void, "if the said Onion, his heirs, executors or administrators, shall pay unto the said Balch, his heirs, executors, administrators or assigns, such sums of money as the said Onion may, at this time, owe the said Balch, with legal interest thereon."

In order to prove the indebtedness of the mortgagor to the mortgagee, at the time of the making of the mortgage, the demandant produced in evidence a promissory note, with certain written transfers indorsed thereon, of which note and indorsements the following are copies: —

"Boston, July 11th, 1829. For value received I promise to pay John D. & M. Williams, or order, three hundred and seventy-five dollars in eighteen months, with interest. Charles Onion. Witness — Silas P. Holbrook."

"We hereby, for value received, transfer this note to Samuel Johnson and Wesley P. Balch, or their order, without recourse to us. Jno. D. & M. Williams."

"I hereby transfer the right, title and interest which I have, as administrator of Samuel Johnson deceased, to one half of this note, without recourse. Samuel Johnson, administrator of Samuel Johnson deceased."

Neither of the signatures was disputed, and there was no date to either of the transfers. No other evidence was offered on either side, and the mortgagee disclaimed any other indebtedness to him by the mortgagor, than what arose from the transfer of the note.

It was contended, on the part of the defendant, in the first place, that there was no sufficient evidence of indebtedness from him to the plaintiff, at the time of making the mortgage, because it did not appear, that the note was transferred to the plaintiff before that time; but the auditor ruled, that where the transfer of a negotiable note was without date, the pre-

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sumption was, that the transfer was made about the time or soon after the time of making the note; and that in this case, the presumption, that the transfer was made before the mortgage was given, was strengthened by the consideration, that, for any thing appearing to the contrary, the money due on the note was the only sum which the mortgagor owed to the mortgagee, at the time of the making of the mortgage, and that otherwise the making of the mortgage was entirely useless.

The defendant contended, secondly, that admitting the transfer to have been made before the mortgage, still there was no legal indebtedness to the plaintiff, on the part of the defendant; for, although the note was duly attested, yet such attestation did not take the note out of the statute of limitations, when transferred and in the hands of an indorsee; and there was consequently no legal indebtedness thereon from the mortgagor to the mortgagee. The defendant attempted to distinguish the case from that of a note secured by mortgage, and barred by the statute of limitations, while in the hands of the original promisee; in which case, he admitted that the mortgage would be available, although a suit on the note might be defeated by setting up the statute of limitations as a bar.

But the auditor, assuming that the note was legally transferred to the demandant by the indorsements thereon, according to the legal presumption, was of opinion, that the making of the mortgage was in equity an acknowledgment in writing, on the part of the defendant, that the amount thereof was justly due; and as the defendant's object was, by a hearing in equity, to defeat the operation of his deed, and relieve the estate from the incumbrance, he must himself conform to the principles and rules of equity, and pay the plaintiff what was equitably due to him, namely, the amount of the note and simple interest thereon, according to the tenor of the same.

J. J. Clarke, for the defendant.

E. Wilkinson, for the plaintiff, was not called on.

By the court. The court concur in opinion with the auditor on both points.

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CYNTHIA J. MORSE *vs.* EDWIN THOMPSON.

The act of 1842, *c.* 74, does not enable a married woman to make a devise of her real estate to her husband. WILDE and DEWEY, Justices, dissenting.

THIS was an appeal from a decree of the judge of probate for this county, approving and allowing the last will and codicil of Roxa M. Thompson, deceased, a married woman, and the wife of the appellee, by which she devised the whole of her real estate to her said husband, and thereby disinherited the appellant, who was her only child and heir, of a valuable real estate, which would otherwise have descended to such appellant. The consent of the appellee was indorsed on the will.

The appellant, who was a minor, and prosecuted this appeal by her guardian, alleged as a reason for the appeal, that by the law of this commonwealth, a married woman is not competent to devise her lands and real estate to her husband.

J. Richardson, for the appellant.

J. J. Clarke and *W. S. Leland*, for the appellee.

The opinion of a majority of the court was delivered by

FLETCHER, J. The decree of the judge of probate, from which this appeal was taken, approved and established the will of Roxa M. Thompson, wife of Edwin Thompson, devising her whole real estate to her said husband. The appellant is the only child and heir at law of the testatrix. The only question submitted for decision is, whether or not a married woman can make a will devising her real estate to her husband.

It seems to have been settled in very ancient times, that a married woman might with the consent of her husband dispose of her estate by will. But by the common law, a married woman never could make a valid devise of land, with or without her husband's consent, to any person whatever. She was considered so entirely under the power of the husband, that she could in no case make what, in propriety of speech, is called a will. *Marston* v. *Norton*, 5 N. H. 205. It is said

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by the court in the above case, that a married woman is not, by the common law, *sui juris*, but is *sub potestate viri*. She is under a civil disqualification arising from want of free agency, and not from want of judgment.

The English statute of wills, 32 Hen. 8, *c.* 1, authorized any person having lands, &c., to devise them, and it seems to have been the better opinion, on the construction of that statute, that a married woman could not make a valid will of lands. But as "divers doubts, questions and ambiguities" had arisen or were apprehended, on that and other points, the statute of 34 and 35 Hen. 8, *c.* 5, was made to remove them; and this last statute (§ 14) expressly prohibits such devises by married women. 1 Jarman on Wills, (Perkins's 2d ed.) 29.

In this commonwealth, by a statute passed in 1692, it was enacted, that any person, lawfully seized of any lands, &c., in his own proper right in fee simple, shall have power to give, dispose and devise, as well by his last will and testament in writing, as otherwise by any act executed in his life, all such lands, &c. Prov. & Col. Laws, 230. The statute of this commonwealth of 1783, *c.* 24, contains a provision substantially in the same language, and is also substantially the same, as the English statute of wills. There is no express exception of married women in this statute, which gives power to every person of full age and sound mind, being seized in his own right of lands, &c., to dispose of the same by will; and yet it has been held, that this does not give married women the power to devise their estates. *Osgood* v. *Breed*, 12 Mass. 525. The provision in the Rev. Sts. *c.* 62, § 1, in regard to wills, is substantially the same as that in the statute of 1783.

It is clear, therefore, that the testatrix, being a married woman, had no power, under the general law in regard to wills, to make the will in question. She had no particular or special power derived in any way or manner whatever. If, therefore, she had any power to make a will, it must have been wholly and exclusively by force of the statute of 1842, *c.* 74.

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She had such power, and only such power, as was given her by this statute; and the precise question here is, whether by this statute she had power and authority to make a will giving her estate to her husband. The whole case turns entirely on the construction of the statute. The statute, manifestly, upon the face of it, does not give to married women a general, unqualified, absolute power to make wills, disposing of their property and estates, but there are provisions and limitations. The act, after providing that any married woman may devise and dispose of, by last will and testament, any property held in her own right and separate from that of her husband, then has the following proviso, to wit: "Provided, that the rights and interests of the husband, in and to any such property, shall in no way be affected thereby."

It was maintained, in the argument for the appellee, that by this proviso in the act, the wife was prohibited from disposing of her property by will, to the prejudice of the rights and interests of the husband, but that she might make a will favorable to his rights and interests, by giving him all her property. There is certainly no such distinction to be found in the terms or import of the proviso itself. Besides, upon that construction, the act enables the wife to give to her husband absolutely her real estate, in which he has a life interest, and any other property in which he is interested, but prohibits her from giving either to any one else; and by a subsequent provision in the act, she is not allowed to make this devise to her husband, without his express consent in writing indorsed on the will. It is hardly credible, that the legislature should pass such an act.

In truth, the terms in this provision in the act are perfectly clear and unambiguous, and have one and but one distinct, intelligible meaning. The terms are: "Provided, that the rights and interests of the husband to and in any such property shall in no way be affected thereby:" that is, the rights and interests of the husband, in the property of his wife, shall be in no way affected by her will. The wife, therefore, has no power by the statute to make a will, by which the

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rights and interests of her husband to and in her property will be in any way affected. The statute does not say, that the rights and interests of the husband to and in her property shall be in no way prejudiced, or impaired, or unfavorably affected, by the will of the wife; but shall be in no way affected, favorably or unfavorably, diminished or increased.

The husband shall not be made richer or poorer, but shall be entirely disinterested in regard to the disposition which the wife may make of her property by will. Such is the plain, clear import of the terms of the act, and such must be taken to be the meaning of the legislature, unless there be something in the act to control and qualify the meaning of these terms, and to show a different intention in the legislature. Upon this construction, a meaning and effect can be given to every part of the act. The remainder of the wife's real estate, after the expiration of the husband's life estate, personal property held in trust for the wife, and perhaps other property of the wife, may be disposed of by her will, under the provisions of the act. The legislature may have intended, by taking away from the husband all interest in the disposition which the wife may make of her property by will, to exempt her from his control arising from the relation of husband and wife, and which by the common law is a disqualification of a married woman for devising her lands.

A testamentary disposition of a wife of her personal property in favor of her husband has been held void, though made with his consent; such a bequest of a feme covert to her husband with his consent being considered as nothing more or less than a gift of a husband to himself. *Hood* v. *Archer*, 1 McCord, 225.

The other parts of the act favor this construction of this clause. The next clause is as follows: "Nor shall such will be valid, unless such husband, if of sound mind and competent to act, shall give his assent thereto, expressed in writing and indorsed thereon." In the present case there was a compliance with this provision. The consent of the husband in writing that the wife should give her property to him was indorsed on the will. But if a will can only be made in

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favor of a husband, and in no case unfavorable to his interests, it would hardly be necessary to require his forma. assent.

The clause in the act, in regard to the interests of the husband, must have either the construction put upon it by the appellant, that the rights and interests of the husband shall be in no way affected, favorably or unfavorably, by the will of his wife; or that put upon it by the appellee, that the rights and interests of the husband may be favorably but cannot be unfavorably affected by such will. It would seem, that the latter cannot be the true construction, from the subsequent clause, which requires the assent of the husband to the will, which upon this construction can only be in his favor, so far at least as regards all property, in which he would have an interest if there were no will. Upon this construction, the legislature is made to enact, that a wife may make a will in favor of her husband, and in favor of no one else, but that she shall not be allowed even to give her husband her property, without his consent in writing indorsed on the will. It is not easy to believe, that the legislature would make such a law.

But if, by the act, the husband would have no interest in the will of his wife, to require his assent to give it validity, was, on many accounts, highly reasonable. To require such assent was reasonable, with reference to the relation of husband and wife, and to protect the wife against any injudicious or unsuitable disposition of her property. In a matter of so much importance, it was reasonable to require, that the wife should act with the advice and consent of her husband; he not being exposed to the influence or bias of any personal or private interest of his own. But the act provides, that if the husband is not of sound mind and capable of acting, then the wife may act alone.

Upon the whole, the conclusion is, that the provision in the act that the rights and interests of the husband, to and in any property of the wife, shall be in no way affected by her will, necessarily and in express terms prohibits the wife from making a will giving her property to her husband; as his

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rights and interests to and in her property would be directly and pointedly affected thereby, contrary to the provision of the statute, as there is nothing in the will but a devise to the husband, and as the wife could not, by law, make such a will, the decree of the judge of probate allowing the will must be reversed, and a decree disallowing the will entered.

DEWEY, J. I cannot concur in the opinion of a majority of the court, upon the question raised in the present case. After much consideration, I see no reason for reversing the judgment of the court of probate, establishing the will of Roxa M. Thompson.

The incapacity of a feme covert to make a will disposing of her separate property, prior to the statute of 1842, *c.* 74, was a general incapacity to make a will devising such property to any person, and not a particular incapacity to devise to her husband. There is nothing in the relation of husband and wife, that prevents either from being the object of a devise from the other. A will differs from a contract, or a gift *inter vivos*, in this material point, that it does not take effect while the devisor lives, and so in truth it transfers no right of property from one to the other, while the relation of husband and wife exists. The death of the testatrix or testator, which alone gives effect to a will, is also the termination of the marriage relation between the parties. Hence, although the husband cannot contract with his wife, or make her the grantee in a deed, during the coverture, yet it has never been doubted, that the husband may by his last will and testament give his estate, real and personal, to his wife. It is quite obvious, therefore, that the reason why a feme covert cannot by will devise her property to her husband, is not because of the intimate relation subsisting between them, or the oneness of the parties, as it is sometimes expressed; as that would as effectually debar the husband from making a will in favor of his wife, as a wife from making a will in favor of her husband.

The only real ground of objection, and that upon which the doctrine of the incapacity of the wife to make a will giving her separate property to her husband rests, is that by force

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of her marriage relation, she is incapacitated to act in relation to her property, and while under coverture can devise to nobody. Such is undoubtedly the effect of her intermarriage, and unless this incapacity is overcome, by some previous reservation of such right, through a proper instrument securing to her power to dispose of her separate property, or by force of some statute provision giving such power to a feme covert, she cannot make a will devising her separate property to any person whatever. This restriction upon her is general, and has no more application to a devise to her husband than to a devise to a stranger.

A recurrence to the books of authority, upon this subject, will be found fully to sustain the position, that where the right is reserved to a feme covert before the marriage, by a marriage contract or other proper instrument entered into by the parties about to assume the marriage relation, or where estate has been conveyed to a trustee with the reserved power to a feme covert to devise by will, she may as well exercise the power to devise by making a devise to her husband as to a stranger. The case of *Bradish* v. *Gibbs*, 3 Johns. Ch. 535 and cases there cited, are direct to the point.

The moment the incapacity is removed, and the genera power attaches to a feme covert to make a will of her separate property, the power exists to make such will in favor of whomsoever she pleases; and the marital relation no more restricts the wife from devising her property to her husband, than such relation restricts the husband from devising his property to his wife. The power in such cases is coextensive as to both husband and wife.

The only real question in the present case is this: Has the testatrix from any source acquired the general power to devise her separate estate? The case shows no ante-nuptial contract or marriage articles, or any conveyance to a trustee, to hold the same under a reservation of power after the marriage to devise the same. The only authority, for this feme covert to make a will of her separate property, for the benefit of any person, is derived from the statute of 1842, *c.* 74. If not found there, I admit this will cannot be sustained, by reason

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of incapacity on the part of the testatrix, to make a will giving the property to her husband.

This brings us to the question of the proper construction of the statute. Upon an examination of the statute, we find the first clause very general, giving full and ample authority to a feme covert to devise her separate property. If the statute had been limited to this clause, and had contained no further provision, no one, I suppose, could doubt, that the capacity was thereby conferred upon a feme covert to devise her estate generally, and of course including the capacity to devise to her husband. But appended to this general power to devise is annexed the following language: "Provided that the rights and interests of the husband to and in any such property shall in no way be affected thereby."

The further inquiry is, whether the power to devise generally, which is so fully given in the first clause of the act, is so limited by this proviso, as to except from the operation of this statute all devises by the wife to her husband or for his benefit. The proposition that I maintain as to this proviso is this, that it was introduced solely for the benefit of the husband, and to secure more fully his interests, by a declarative clause, that any devises in the will of his wife should not impair any of his rights to the property devised, be they inchoate, as estates by the tenancy by curtesy, or rights under deeds of trust, or antenuptial contracts by which such estate would vest in the husband at the death of the wife.

In my opinion, "the rights and interests," which are the subject of the proviso in this statute, are exclusively those held and enjoyed by the husband independent of the will of the wife, rights already secured to him through other legal or conventional modes; and this proviso has not the least reference to any rights or interests that may vest in him by the mere effect of a devise to him in the will of his wife. If I am right in this view of the character of "the rights and interests not to be affected" by such will, then the proviso creates no embarrassment or difficulty, or limits the power of the wife, in devising her estate to her husband.

A proviso, in these or words of similar import, may be

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often found annexed to legislative acts conferring new powers, and when thus used, it is with reference to previously existing rights, and not to those arising under the new power itself. It will be seen, by an examination of our statutes, that the forms of expression, "shall not affect," "shall not interfere with," "shall not impair," are perfectly synonymous when used by the legislature as provisoes or conditions to grants of powers or rights. An examination of the statutes will satisfy any inquirer of the truth of this proposition. Take the statutes of the year 1846, and a very considerable number will be found, that will illustrate and establish this position, that a proviso, "that the rights and interests of A. B. shall not be affected thereby," is most obviously used as synonymous with "impaired." See statutes of 1846, *c.* 73, 80, 102, 105, 140.

I cannot doubt, that the words in the proviso of the statute of 1842, *c.* 74, "that the rights and interests of the husband shall in no way be affected thereby," are to be taken to be precisely equivalent to saying that the rights and interests of the husband "shall not be impaired thereby." It would, in my opinion, be entirely erroneous to give the words "shall in no way be affected thereby" any more extensive application in the present case, than the words "shall not be impaired thereby" would require; and in either form the proviso has no reference to rights and interests of the husband to be acquired by him under the will itself.

If this reading of the statute is correct, the will is a legal will, and must be allowed and established. If the words of the proviso are only equivalent to "shall not be impaired thereby," it is impossible to make it a restriction upon the capacity of the wife to make a valid devise in favor of her husband. Such a devise cannot, by any possibility, "impair the rights and interests" of the husband. Nor can I have less doubt, that a reasonable construction of this proviso will limit it to other rights and interests than those arising under the will itself.

But it is further contended by the appellant, that if the construction just stated could be authorized, if we were only to consider the language of the first proviso, yet the further

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proviso, "nor shall any such will be valid unless such husband, if of sound mind and competent to act, shall give his assent thereto, expressed in writing and indorsed thereon," can only be explained upon the hypothesis, that the authority given by this statute to a feme covert to make a will was solely the power to devise to other persons than her husband. It is said, that it would be absurd for the legislature to require, as a condition precedent to the validity of the will, that the husband should assent to and approve it, by indorsing such approval on the will as is required by this proviso, if the devise was to the husband himself, or could be legally made to him. But it is to be remembered, that many, perhaps a large majority of the cases, may be those where the devise is wholly to others; again there are other wills, where the husband may be a devisee, and yet to a comparatively small amount with other devisees. It may have been deemed that in all such cases, that supervision of the husband, which would result from requiring his indorsement upon the will, would operate to secure more effectually the wife from improper influences over her in the disposition of her estate. Such a provision might be thought proper and well adapted to a large majority of the cases of wills of femes covert, and being so might have been introduced generally, and without making any exception in the case of the devise being wholly to the husband.

Granting, however, that some consideration is due to this line of argument, and the inference that is said to arise from the second proviso, requiring the husband to indorse his approval of the will before it can have effect, yet the weight of the argument is in my view more than overcome by the further proviso introduced into this act, giving the wife full power to revoke her will without the assent of her husband. For what class of cases was this provision made? If the statute had restrained the wife from making her husband the object of her bounty, even in the smallest degree; if no will could be made by her favorable to him; if no case could exist where he had an interest in perpetuating her will, (as upon the assumption that he could not be a devisee under the will

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there could not); it would seem to be very useless, not to say strange, to have introduced this third proviso, by which she is authorized to revoke her will without the assent of her husband. This last proviso must have been introduced to secure the free agency of the wife, in revoking a will she has made in favor of her husband. His interest being adverse to a revocation of a will made in his favor, the proviso was necessary to secure the wife fully in the right to make her will.

But if in no possible case his future interests or rights could be affected by the will, as is contended by those who deny the authority of the wife to devise to her husband, then this proviso was quite unnecessary. His assent would of course be given to an instrument of revocation of a will devising her property to others, or where the revocation could not affect his interest prejudicially. This right, thus directly reserved to a feme covert, to revoke her will without the assent of her husband, in my view, therefore, strongly confirms the idea, that the husband may have an interest in the will, which would induce him to refuse his assent to a revocation of such will; or, in other words, that he may be a devisee of his wife.

We come back again to the principal question, that is, whether the statute of 1842, *c.* 74, confers upon a married woman a power to devise her separate property to all persons; or is it a power to devise to every body else but her husband, excluding him entirely, under all circumstances, from being made the object of her beneficence? Such a restriction, so unnatural, is only to be established by a clear and manifest expression of the legislative will. If found in this statute, it is in the first proviso. I have already shown, that the words of limitation there used are merely synonymous with "shall not impair," taking these words as found in many other statutes; and I can give no greater or more extended meaning to them.

In the construction of a statute, the paramount object is to give effect to the legislative will. This is a remedial statute, and is, upon every principle, to be construed liberally. The existing evil was a general incapacity in a feme covert

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to make a will of her separate property. The statute comes to relieve that general incapacity, to enable her to devise her separate property, and to devise it, as other testators do, to any person whom she may select as the object of her bounty. It was especially needed in reference to a devise to the husband, as otherwise a conveyance to a trustee by a husband and wife would be required, if she would pass the property to him. I see no necessity for giving this statute that narrow construction, which will deprive the wife of the power of bestowing any part of her estate upon her husband by devise, however needy he may be, and though she may have no other relative who has claims on her bounty.

In every view, it is much better that the wife should have the power to devise her estate to her husband, than to be obliged to resort to that circuitous mode, which all acknowledge to be legal, a conveyance by deed to a third person, her husband joining in the deed, and such third person then executing a conveyance of the estate to the husband alone. Her estate thus conveyed is gone from her forever, but when given by devise, is always under her control and liable to be revoked at her pleasure. In every view, which I can take of this subject, I am confirmed in the opinion, that the statute of 1842, *c.* 74, was intended to remove the general incapacity of a wife to make a devise of her separate estate, and that by it she is vested with capacity to make a devise to any person, her husband included, conforming of course to the forms prescribed by the statute.

In coming to this result, we only return to the ancient common law, as it existed before the statute of Richard. We only adopt the familiar principle of the civil law; we only perpetuate this symmetry in the law as to the capacity or incapacity of a feme covert to make a will being general and not limited, and without any distinction whatever in capacity to devise to her husband or to other persons; a doctrine which has prevailed under all systems, whether the civil law, the ancient common law, or the common law modified by the English statutes.

The distinction, now proposed to be introduced, is a novel

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and an unreasonable restraint upon the power to devise, and only to be adopted where the obvious language of the statute requires it, and I do not think the statute in question of that character. The practical importance of the construction of the statute, giving the larger power to devise, is becoming every day more and more felt, from the great facilities conferred on married women, for acquiring and holding separate property, by our recent course of legislation. Holding to a great extent, as they now may, all the estate they acquire by gift, or devise, to their own separate use, it would at least indicate a defective system of law, if a married woman could, under no circumstances, devise any portion of her property to her husband. I adopt no such construction of this statute, but am of the opinion, that the will of Roxa M. Thompson, devising her separate real estate to her husband, was a valid will, and as such ought to be approved.

WILDE, J. I concur in the opinion, that the will was well authorized by the statute. *Decree reversed.*

Since the above decision was made, the legislature, by *St.* 1850, *c.* 200, has enabled married women to devise and bequeath their separate estates to their husbands.

ROBERT SWAN *vs.* JAMES LITTLEFIELD & another.

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The discharge of a bankrupt, under the late bankrupt act of the United States, may be impeached by proving unlawful preferences and payments, made by him in fraud of the act, between the day when the same was passed, and the day when it took effect.

THIS was an action of assumpsit by the plaintiff as the indorsee of two promissory notes, signed by the defendants as copartners, one dated December 4th, 1839, and the other October 6th, 1841.

The defence relied upon was a discharge under the insolvent law of this commonwealth, which took effect on the 17th of January, 1842, and a discharge under the bankrupt law of the United States, which took effect on the 17th of August, 1842.

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The plaintiff undertook to avoid these discharges, on various grounds, and, among others, he specified unlawful payments and preferences of preëxisting creditors, within six months previous to the application of the defendants for the benefit of the insolvent law (January 15th, 1842); they being then insolvent in fact, and contemplating the making of such application. The plaintiff also alleged the same acts and concealments of property, as frauds upon the bankrupt law of the United States, made and committed subsequent to the 19th of August, 1841, being the day of the passage of the act; the defendants being then insolvent, and intending an application for the benefit of the bankrupt law.

The only evidence offered by the plaintiff, under the last branch of his specification, tended to show, that, subsequent to the 19th of August, 1841, (the day of the passage of the bankrupt act) and previous to the 1st of February, 1842, (the day when the act went into operation) the defendants conveyed and delivered certain property for the purpose of preferring preëxisting creditors; the defendants being then in fact insolvent, and contemplating an application for the benefit of the bankrupt law.

The presiding judge of the court of common pleas, *Bigelow*, J., before whom the case was tried, instructed the jury upon this evidence, that such preferences so made by the defendants, between the 19th of August, 1841, and the 1st of February, 1842, did not avoid the discharge obtained by them under the bankrupt law; whereupon the jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

A. L. Cushing, for the plaintiff, relied on *Hutchins* v. *Taylor*, 5 Law Rep. 289.

J. J. Clarke, for the defendants, referred to *Wood* v. *Owings*, 1 Cranch, 239; *M'Menomy* v. *Roosevelt*, 3 Johns. Ch. 446; *Commonwealth* v. *Marshall*, 11 Pick. 350; *Medford* v. *Learned*, 16 Mass. 215; *Judd* v. *Ives*, 4 Met. 401; *Griswold* v. *Pratt*, 9 Met. 16, 19; *Washburn* v. *Bump*, 10 Met. 392; *Tebbetts's Case*, 5 Law Rep. 259, 267; *Hutchins* v. *Taylor*, 5 Law Rep. 289; *Chadwick's Case*, 5 Law Rep. 457; *Horton's Case*, 5 Law Rep. 462.

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WILDE, J. This case depends on the bankrupt act of 1841, *c.* 9, § 2, (5 U. S. St. at Large, 442,) by which it is provided, "That all further payments, securities, conveyances, or transfers of property, or agreements, made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person, any preference or priority over the other creditors, shall be deemed utterly void, and a fraud upon this act."

At the trial the plaintiff introduced evidence tending to prove, that subsequent to August 19th, 1841, (the day of the passage of the bankrupt act) and prior to February 1st, 1842, (the day when the act went into operation) the defendants conveyed and delivered certain property for the purpose of preferring preëxisting creditors, they, the defendants, being then insolvent and contemplating bankruptcy. Upon this evidence, the judge ruled, and so instructed the jury, that such preferences did not avoid the discharge obtained by them under the bankrupt act.

This ruling is supported by *Chadwick's Case*, 5 Law Rep. 457, in which it was held, that an assignment made by debtors subsequent to the passage of the bankrupt act, but before it was to go into operation, of all their property, in trust for certain preferred creditors, would not prevent their discharge and certificate under the act, on their voluntary petition. The word "future" in the above-cited clause in the second section of the bankrupt act, was held to refer to the day when the act took effect. But a contrary construction was given to this clause by judge Story in the case of *Hutchins* v. *Taylor*, 5 Law Rep. 289, and we all concur in his construction of that clause. "The act," as judge Story remarks, "became a law by the very terms of the constitution of the United States, as soon as it was approved by the president, although its operation was suspended until the 1st of February, 1842."

The act therefore might effectually prohibit the doing of any acts between the time of its passage, and the time when it was to go into operation, if such was the intention of its framers; and we cannot doubt that such was their intention.

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And we think it is expressed with sufficient certainty. The natural meaning of the word "future" has reference to the time of the passage of the act; and the object and policy of the act clearly show that such was its intention. Another clause in the same section prohibits the granting of any discharge to a bankrupt, who had, subsequently to the 1st day of January before the passage of the act, given or secured any preference to one creditor over another, in contemplation of the passage of a bankrupt law, unless the same should be assented to by a majority in interest of those of his creditors, who had not been preferred. This clause has a retrospective operation, and strongly evinces the intent of congress to prohibit all preferences to evade the bankrupt act, although made previous to its passage; and we think it incredible, that congress should have intended to allow six months for all the bankrupts in the United States to evade the act by the transfer of all their property to favorite creditors, against the manifest object and policy of the act.

In *Chadwick's Case*, Irwin, J., admits that where a statute requires something to be done in future, or forbids that which was lawful before to be done in future, and there should not be found, in any other part, language to restrict, qualify, enlarge, or show another meaning than the words naturally import, it takes effect from its passage, however inconvenient or injurious the consequences. But the learned judge was of opinion, that other sections in the bankrupt act did show another meaning to the word "future" in the second section.

But it appears to us, that the intent of congress is so clearly expressed in that section, that it is not to be restricted or qualified, in its construction, by the other provisions in the act. The intent was, we think, to prohibit all preferences of one or more creditors over others, in the intermediate time between the passage of the act and its going into operation, although the prohibition could not be enforced until after the act went into operation. It is undoubtedly true, that in giving a construction to this section, we are to take into consideration every other provision in the section, which has any tendency to explain its true meaning. But thus considering

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all the provisions of the act, we are of opinion, that the language of the clause in question in the second section is sufficiently clear, notwithstanding the other provisions of the act. *Exceptions sustained.*

FISHER A. KINGSBURY *vs.* ISAAC N. ELLIS & another.

A promissory note, given to a magistrate for the amount of fines and costs imposed by him upon the maker of the note on a criminal charge, is void, for want of consideration moving from the payee personally, and also because the transaction is in violation of a public duty.

THIS action, which was assumpsit to recover the amount of a promissory note signed by the defendants as promisors, was submitted to the determination of the court of common pleas, and came by appeal to this court, upon the following agreed statement of facts:—

The plaintiff is a magistrate of this county, and in January last, the defendant, Isaac N. Ellis, was arraigned before him, upon seven distinct complaints, for selling spiritous liquors without a license, and was convicted upon the charge contained in each of the complaints, and thereupon sentenced to pay to the use of the commonwealth a fine of $20 upon each, with costs of prosecution, amounting in the whole to the sum of $181·86, (the amount of the note in suit) and to stand committed until these several sentences were complied with. The defendant expressed a wish, and moved for a remission of a part of the fines; but was informed by the plaintiff, that he as a magistrate had no authority to remit any part thereof; that if he, the defendant, wished for such remission, the only way to obtain it was to appeal from his judgment, and enter his appeal at the next court of common pleas, as the district attorney, and he only under the direction of the court, had the power of remitting the whole or any part of the fine and cost; and for that purpose was informed by the officer present, that he must employ a lawyer. This Ellis declined to do, and said he would

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pay the fines and costs, if the plaintiff, the magistrate, would take his note for a few days. The plaintiff agreed to take his note, if he would procure a surety, which he did; and the note now in suit was then given, payable to the plaintiff, the magistrate, or order, on demand, with interest; and the plaintiff then informed Ellis, that he should leave the note with the county treasurer, where he could call and pay it. The note not having been paid, the plaintiff commenced this action for the recovery thereof, at the court of common pleas, to be holden on the fourth Monday of April last, which action was duly entered and continued from term to term to the next December term; at which, on the 13th day of December, 1848, the plaintiff paid to the county treasurer of this county, the full amount of the said several fines, being $140. The fees of the magistrate and witnesses were correctly taxed, and the fees of the constable, taxed at $3·03, in each case making $21·21, have been paid to the constable by the defendant.

The case was argued in writing by *F. A. Kingsbury*, for himself, and by *J. Richardson*, for the defendants.

Shaw, C. J. This action is assumpsit on a note given by the defendant for the amount of several fines and costs, to which the defendant was sentenced by the plaintiff, acting therein as a magistrate.

Upon the case stated, the court are of opinion, that the plaintiff cannot recover. There was no consideration moving from the plaintiff personally, because he was acting in a judicial capacity, and could have no personal interest, either in committing or discharging the defendant. Nor could he take a note as trustee for the county or the commonwealth, for want of authority.

But a more important ground of defence is, that the consideration was illegal, being in violation of a public duty. The object of the law is to punish its violation; and the mode specially provided is by the actual payment of a fine, to be enforced by immediate imprisonment, until its payment; or by imprisonment for a term of time prescribed by the sentence. *Harris* v. *Commonwealth*, 23 Pick. 280. This case

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is quite distinguishable from that of *Beely* v. *Wingfield*, 11 East, 46, cited in the argument; that was a note given to parish officers, at the recommendation of the court, as an indemnity for expenses personally incurred by the parish.

But such a proceeding as this is entirely contrary to public policy. If a magistrate, or any other judicial officer, could enter into a negotiation with a convict, take a contract to himself, and enforce it by law, it would operate as a temptation to the judge, and lead to the oppression of the accused by the use of public process. If the judge might take a note with surety, he might take a pledge of personal or a mortgage of real estate, or make any other contract in his own name. It would, we think, lead to complicated relations between ministers of the law, and parties accused, entirely inconsistent with the purity, simplicity and directness which should ever characterize the administration of the criminal law.

GEORGE S. GLOVER *vs.* JOHN C. HAYDEN.

On an issue, submitted to a jury, whether an instrument, purporting to be the last will and testament of one deceased, was procured to be made by the undue and unlawful influence of the residuary legatee therein named, evidence having been introduced to prove the affirmative of the issue, it was held, that evidence was admissible, on the other side, that a large part of the property of the testatrix was derived by her by inheritance from her minor son, who died many years previous, and who was greatly attached to the residuary legatee, and had frequently expressed his intention, if he should attain the age of twenty-one years, to leave the bulk of his property to him, and that this intention was known to the testatrix.

THIS was an appeal from a decree of the judge of probate, for this county, approving and allowing an instrument produced by the appellee, as the last will and testament of Jane Hayden, late of Brookline, deceased. The appellant alleged that the instrument in question was procured to be made "by undue and unlawful influence of the said John C. Hayden," and an issue to that effect was made by order of the court and submitted to a jury. The trial was before *Fletcher*,

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J., by whom the case was reported for the consideration of the whole court.

The appellant produced evidence tending to show, that the will was procured by the appellee, by means of undue and unlawful influence exercised by him over the mind of the testatrix. He also produced evidence to show the improbability, that the will would have been made by the testatrix, in the exercise of her own free will and discretion, for various reasons, and particularly on account of the large legacy therein to the appellee.

The appellee produced evidence tending to show, that the will made a natural and reasonable disposition of the testatrix's property, under the circumstances of the case; among which was the great regard and affection of the testatrix for the appellee and his family, who were devisees and legatees under the will to a large amount, the appellee being the residuary legatee.

The appellee then offered evidence to show, that a large part of the property of which the testatrix died seized and possessed was derived by her by inheritance from her son, David Hyslop, who died about the year 1831, under the age of twenty-one years, (at which time she was the wife of the appellee's father); that the son was greatly and affectionately attached to the appellee, and frequently expressed his purpose and intention, if he should arrive at the age of twenty-one, to leave the bulk of his property to him; that his health, for two or three years before his death, was very much impaired, and he often expressed fears that he might not live until he could lawfully dispose of his property by will.

The appellee also produced circumstantial evidence, that the attachment of her son to the appellee, and the intention of the former as to a disposition of his property, were known to the testatrix; but he did not offer any evidence, that the testatrix ever expressed any intention to make provision for the appellee in her will, in consequence of the relation of her son to the appellee, or on account of his intention in favor of the appellee, as above stated.

The appellant objected to this evidence, but it was admit-

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ted; and the jury returned a verdict, on the issue submitted to them, in favor of the appellee. The appellant thereupon moved that the verdict be set aside, and a new trial granted, on the ground, that the evidence objected to was not admissible, and should not have been permitted to go to the jury.

The point of the admissibility of the evidence objected to was argued at length in writing, by *P. Merrick*, and *E. Dexter*, for the appellant, who cited Best on Presumptions, 12, 246; Wills, Circ. Ev. 37; 1 Stark. Ev. 40; *Ellis* v. *Short*, 21 Pick. 142; and by *R. Choate* and *E. Wilkinson*, for the appellee, who referred to *Patterson* v. *Patterson*, 6 S. & R. 55; Waddilove's Dig. 320; 1 Jarm. Wills (2d Am. ed.) 80; *Davis* v. *Calvert*, 5 Gill & J. 269; *Saph* v. *Atkinson*, 1 Add. Ec. 162; *Sperry* v. *Wilcox*, 1 Met. 267; *State* v. *McAllister*, 11 Shep. 139.

Wilde, J. This case has been elaborately argued by counsel, but it appears to the court to be a very clear case.

The issue tried on the appeal was taken by the order of court on the allegation of the appellant, that the will of Jane Hayden, which was approved and allowed by the judge of probate, was procured by the appellee by undue and unlawful influence over the testatrix.

To support the issue on his part, the appellant produced evidence tending to show the improbability that the will would have been made by the testatrix, in the exercise of her own free will and discretion. To rebut this evidence, and to show a motive for the devise and legacy to the appellee, without any influence on his part, he produced evidence to prove, that a large part of the property, of which the testatrix died seized and possessed, was derived by her by inheritance from her son David Hyslop, who was greatly and affectionately attached to the appellee, and frequently expressed his intention, if he should arrive at the age of twenty-one years, of bequeathing the bulk of his property to him. And the appellee also offered circumstantial evidence tending to show, that this intention of the said David was known to his mother. To the admission of this evidence the appellant objected, but it was admitted and to this admission he

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excepts. We cannot, however, doubt, that the evidence was competent, and was rightfully left to the jury, who were the proper judges of its weight and bearing on the issue. The objection is, that the evidence was irrelevant, and calculated to mislead the jury, and to distract their attention. But if the evidence was wholly irrelevant, it is difficult to imagine how it could mislead the jury, or distract their attention, to the prejudice of the appellant. The evidence is very different from that admitted in the case of *Ellis* v. *Short*, 21 Pick. 142. We think the rule is correctly laid down by Morton, J., in that case: "We do not believe," he says, "that any inadvertent admission of irrelevant evidence, whether it may have affected the verdict or not, ought to be deemed a sufficient cause for granting a new trial. But this is a discretion which the court will exercise with caution; and which it will confine to cases where there can be no reason to apprehend that the irrelevant evidence could have had any improper influence on the jury."

If then the evidence objected to was irrelevant, we think the case would come within this rule, and that a new trial should not be granted on this ground; for we think there is no reason to apprehend, that the evidence could have had any improper influence upon the jury. We are not, however, of the opinion, that the evidence was irrelevant. That a mother, who had inherited a large property from her son, should, in the disposition of it by her will, after she had done with it, regard the wishes of her son, is certainly probable. But if the evidence had any bearing on the issue, it was rightly admitted; for there was other strong evidence to show the motives which the testatrix had to dispose of her property, as she did, in favor of the respondent. It was proved, that she entertained great affection and regard for him and his family. It is said by the counsel for the appellant, that "The most that can be said is, that the wishes of her son might possibly have influenced her mind; but it is equally possible, that they might not. In this state of things, the evidence is not admissible. The facts must have a predominating tendency in favor of the influence, or they are not admissible in evidence." But

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certainly this is not the rule; for the evidence of every fact having any bearing on the issue is admissible, and is not irrelevant, although it has not alone a predominating influence to establish the fact attempted to be proved. Nor is the question as to the sufficiency of the whole evidence to disprove the allegation, that the will was procured by the undue influence of the respondent. Nor is there any legal presumption, as the counsel for the appellant contend, that a mother, who, at the time of her child's death, manifested no purpose to dispose of his property in the manner indicated by him, and who never afterwards, during the twenty years which she survived him, adverted to the wishes and purposes of her son, as the ground or basis of her disposition of the property, would not, under such circumstances, be likely to find a guide in those wishes for herself in the making of her own will. This question being for the jury to decide, upon the whole evidence, and upon the whole matter, we are clearly of opinion, that the evidence objected to was rightly admitted, and that it was not irrelevant, although perhaps it had no great weight. *Judgment on the verdict.*

GEORGE REVERE *vs.* MARSHALL NEWELL.

The provision of the statute of 1844, *c.* 178, § 4, that, to prevent the discharge of an insolvent debtor, whose assets pay less than fifty per cent of the claims proved against his estate, the dissent of a majority in value of his creditors, who shall have proved their claims, shall be signified within six months after the date of the assignment, is a condition precedent, to be strictly construed in favor of the debtor; and where a creditor proved his claim and filed his dissent, after the expiration of the six months, but at an adjournment of a meeting called and held within the six months, it was held, that the condition was not complied with, notwithstanding the provision of the statute of 1838, *c.* 163, § 16, that all things lawfully done at any adjourned meeting shall be of the like force and effect as if done at the original meeting.

THIS was a proceeding in equity, under the general chancery jurisdiction of this court in matters of insolvency, to set aside the discharge of Marshall Newell, an insolvent debtor, granted him by the judge of probate for this county.

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The bill sets forth the application by Newell to the judge of probate for the benefit of the insolvent law, on the 1st day of October, 1847, and the subsequent proceedings thereon; the assignment of his estate by the judge to an assignee on the 16th of the same month; the holding of the first and second meetings of creditors, at which no debts were proved and allowed; an application of the complainant to the judge of probate for an order, and the passing of the same, to sell certain personal estate of the insolvent, which had been mortgaged by him to the complainant, as security for a debt of $2050; and the sale of the property, accordingly, by the assignee, and the satisfaction, by the proceeds thereof, of the complainant's debt in part.

The bill then proceeds to allege, that the third meeting of the creditors of the insolvent, for the further proof of claims, and for acting upon his discharge, was held on Saturday the 15th of April, 1848, at three o'clock in the afternoon, at which time the judge of probate transacted other business in his official capacity, and between four and five o'clock, proceeded to the proof of claims against the insolvent; that the complainant was present punctually at the time appointed, and was ready to proceed to the proof of his claim, but the insolvent moved an adjournment of the meeting, alleging as a reason therefor that his counsel was sick, and that he wished to introduce evidence in opposition to the complainant's claim; that the complainant objected to an adjournment, but that the judge of probate, notwithstanding, after a partial hearing, adjourned the meeting to Monday, the 24th of the same April; that, at the meeting on the 15th of April, claims to the amount of $70·39, were duly proved and allowed, and that at the adjournment of the same meeting on the 24th of April, the complainant's claim was proved and allowed to the amount of $434·39; that the complainant, thereupon, his claim being more than one half in value of the claims of creditors who had proved their debts, and the assets of the insolvent paying less than fifty per cent of the claims proved, did, then and there, by a writing under his hand, signify to the judge of probate his dissent to the granting

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of a discharge to the insolvent; and that the judge of probate, notwithstanding the complainant's dissent, did, on the said 24th of April, grant the insolvent a certificate of discharge.

The prayer of the bill was, that such proceedings might be had, that the validity of the insolvent's discharge might be judicially determined, and if found to be irregular or invalid, might be superseded and set aside, and that the complainant might have such other and further relief as his case might require, and as in justice and equity might seem fit and proper.

The case was argued in writing by *C. L. Hancock*, for the plaintiff, and *J. A. Andrew*, for the defendant.

Wilde, J. This is a bill in equity to set aside the discharge, granted by the judge of probate to an insolvent debtor, on the ground that the complainant, being more than one half in value of the creditors who had proved their debts, did by a writing, under his hand, signify to the judge of probate his dissent to the granting of the discharge. The case turns on the question, whether the complainant's claim was legally proved and allowed, so as to prevent by his dissent the granting of the discharge.

By the statute of 1844, *c.* 178, § 4, it is enacted, that if an insolvent debtor's estate does not pay fifty per cent of the claims proved, a majority in value of the creditors may dissent and prevent a discharge; provided the dissent is made within six months after the date of the assignment.

The complainant's claim was not proved and allowed within six months after the date of the assignment; but he offered to prove the same at the third meeting of the creditors of the insolvent debtor, which was within the six months; when, on motion of the debtor, after a partial hearing, the judge of probate adjourned the meeting to a day subsequent to the six months, notwithstanding the objection of the complainant; and at that adjourned meeting the complainant's claim was proved and allowed.

On these facts, the complainant maintains the general

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proposition, that where adjournments of a meeting are had, the acts done at any adjournment have the same force and effect, that they would have if done at the original meeting; and so is the law generally; and so is the provision in the insolvent law of 1838, *c.* 163, § 16, which provides that all things lawfully done at any adjourned meeting shall be of the like force and effect as if done at the original meeting.

But this case does not, in our judgment, depend on this statute, or on the general rule of law, but on the statute of 1844, *c.* 178, § 4, which expressly requires, that to prevent the discharge of the insolvent debtor, if his estate does not pay fifty per cent of the claims proved, a majority in value of the creditors may dissent, provided the dissent is made within six months after the date of the assignment. This proviso amounts clearly to a condition precedent, without compliance with which, the dissent of the creditors cannot prevent the judge of probate from granting a discharge. *Ex parte Bartlett*, 8 Met. 72, 75. The power given to the creditors is an arbitrary power, for the exercise of which they are not bound to assign any reason; and the statute, therefore, ought to be strictly construed in favor of the insolvent debtor. If the complainant had filed his dissent within the six months, although he did not prove his claim until afterwards, he might perhaps have prevented the discharge; but of this we give no opinion, as no such dissent was filed or made. The statute of 1844 controls the statute of 1838, for although the complainant's claim has been lawfully proved, he has no right to prevent the insolvent debtor's discharge, without a compliance with the proviso in the statute of 1844.

Bill dismissed

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Polly Lewis *vs.* Reuben S. Denney & another & Trustees.

Where the only trustee named in a trustee process is an incorporated banking company, the action must be brought in the county in which such company have their established or usual place of business.

A trustee process, brought in a county in which no one of the trustees dwells, will be dismissed on motion of a trustee named therein or of the principal defendant.

If a trustee process is brought in the wrong county, as to the trustee, the action cannot be maintained upon a discontinuance against the trustee.

This was a trustee process, in which the only supposed trustees were the president, directors and company of the Mechanics bank, and the president, directors and company of the Citizens bank, corporations existing by the laws of this commonwealth, and having their established and usual places of business in the city and county of Worcester.

The principal defendants and the trustees both moved, that the action be dismissed, on the ground, that there was no trustee named in the writ, who dwelt in the county of Norfolk, but that all the trustees named therein dwelt and had their place of business in Worcester, in the county of Worcester.

The plaintiff was described in the writ as of Roxbury in the county of Norfolk; one of the defendants as of Worcester in the county of Worcester, and the other of Saco, in the state of Maine; and the writ was regularly served upon the defendants.

F. H. Dewey, for the trustees and principal defendants.

There was no appearance for the plaintiff.

Wilde, J. The principal defendants, and the trustees, have separately filed motions to dismiss the action, because it appears by the writ and service, that the only trustees named therein, being two banking corporations, belong to and have their established places of business in the county of Worcester, and therefore the action is not within the jurisdiction of the court in this county. And we are of opinion that the motions are fully sustained by the Rev. Sts. *c.* 109, § 7, and *c.* 90, § 16, and *c.* 2, § 13. By the first statute it is provided,

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that "If all the persons named as trustees dwell in one county, the writ shall be returnable in that county." If the trustees were natural persons, dwelling in the county of Worcester, there can be no doubt that the writ should have been made returnable in that county; for such is the express requirement of the statute. By the Rev. Sts. *c.* 2, § 13, it is provided, that the word "person" may extend and be applied to bodies politic and corporate, as well as to individuals. And by the Rev. Sts. *c.* 90, § 16, it is provided, that "When one of the parties to the action" (that is, any action) "is a corporation, of any other description than those before mentioned in this section," (not including banking corporations,) "the action may be brought in any county, in which such corporation shall have any established or usual place of business, or shall have held its last usual meeting, or shall usually hold its meetings; or if the other party to such action is a natural person, the action may be brought in the county where such person lives."

From the language of the first-cited statute it might be doubtful, whether it should be so construed as to apply to bodies politic and corporate, as well as to individuals; but taking into consideration the other two statutes, in the construction of that first cited, we think there can be no reasonable doubt, that it was intended to apply to corporations, such as the trustees in this case, as well as to natural persons. There can be no reason why it should not be so construed; for the object of the statute is, to prevent trustees from being compelled to answer in any other county than that in which they dwell; and although the word "dwell" is not usually applied to corporations, yet the reason of the provision unquestionably applies to corporations. We are therefore of opinion, that the motions to dismiss the action are well founded; nor can the action be maintained by the plaintiff's discontinuing against the trustees. The tenth section of the Rev. Sts. *c.* 109, applies only to cases where the court has jurisdiction. The case of *Greenwood* v. *Fales*, 6 Greenl. 405, cited by the defendants' counsel, fully supports the defendants' motion on this point. That case, how-

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ever, was decided on a plea in abatement; and by the law of Maine relative to this subject, it is provided, that if an action is brought in a wrong county, the writ shall abate. But there is no such provision in this state, and we think no plea in abatement is necessary, all the essential facts appearing on the writ and return. See *Jacobs* v. *Mellen*, 14 Mass. 132.

Action dismissed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF ESSEX, NOVEMBER TERM 1849, AT SALEM.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE,
HON. CHARLES A. DEWEY,
HON. RICHARD FLETCHER, } JUSTICES.

JOSEPH M. TITCOMB *vs.* SOLOMON H. CURRIER.

A trustee of land cannot transfer his legal estate by a deed purporting only to convey all the right, title, and interest of the *cestui que trust* therein.

THIS was a writ of entry, to recover one undivided eighth part of a lot of land, in Newburyport. On the trial, before *Dewey*, J., the judge being of opinion, that the demandant was entitled to recover, the tenant was defaulted, and the case reported for the consideration of the whole court. The facts, upon which the decision was founded, sufficiently appear in the opinion of the court. The case was argued and decided at a former term.

O. P. Lord, for the demandant.

C. B. Goodrich and *N. J. Lord*, for the tenant.

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WILDE, J. Upon the argument of this case several questions were discussed by counsel, upon which it is not necessary to express an opinion; for on examination of the demandant's title, a defect appears which renders the other questions immaterial. That title is derived from the last will and testament of Anthony Davenport, through a deed from Solomon H. Currier and George Davenport to Solomon Haskell, and sundry other mesne conveyances.

By the will the testator devised one eighth part of all his estate, real and personal, to Solomon H. Currier and George Davenport in trust for his daughter Mary Coffin The question is, what title, if any, passed by the deed of Currier and Davenport to Haskell. By that deed the grantors conveyed or undertook to convey "all the right, title and interest that the said Mary Coffin had to one eighth part of all the real estate belonging to Anthony Davenport, late of Newburyport, deceased, as devised to said Mary Coffin by his last will and testament." Now as Mary Coffin took only an equitable estate, as *cestui que trust*, under the will of her father, we think the legal estate of the trustees did not pass to Haskell by this deed. Nothing was conveyed but the right and title of Mary Coffin.

If the words had been used as words of description or designation of the land conveyed, referring for that purpose to the estate of Mary Coffin, or had there been any words which could be so construed as to convey the title of the trustees, the legal as well as the equitable estates would have passed; but there are no such words; and the recital in the deed cannot enlarge or control the words of the grant. If these words were doubtful, the recital might aid in the construction; but they are not; they expressly grant the right and title of Mary Coffin, and nothing more.

It may be that such was not the intention of the parties, but the supposed intention of the parties cannot supply a defect, or correct a mistake, in the conveyance. Whatever may have been the intention of the parties, we think it clear, that the deed to Haskell cannot be so construed as to convey to him the legal title to the demanded premises.

Default taken off.

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COMMONWEALTH *vs.* WILLIAM P. SHAW & another.

4c 593
188 *419
188 *579

A witness, on cross examination, cannot be asked a question, otherwise irrelevant, for the purpose of testing his moral sense.

The rulings of a judge, in the trial of a case, limiting the course of proceeding on cross examination, and excluding inquiries in respect to topics irrelevant to the matter in issue, are not subject to exception.

THE defendants being on trial in the court of common pleas, before *Perkins*, J., on an indictment charging them with breaking and entering a shop in the night time, one Pearson was examined as a witness for the prosecution, and testified, among other things, that Mallory, one of the defendants, was a boarder in his house, and that the witness, in the absence of Mallory, seeing his valise partly open, and some unsealed letters exposed at the mouth of it, took some of the letters and read them. On cross examination, the witness was asked, whether it was his custom to open the letters of his boarders, and if he knew whether it was right or wrong to open and read the private letters of a boarder in his own room. These questions were objected to by the district attorney, and the counsel for the defendant, on being asked what was the object of putting them, said that it was to test the moral sense of the witness. The judge ruled that they could not be put for that purpose.

The jury having found the defendants guilty, they alleged exceptions to various rulings at the trial, of which the only one necessary to be stated is the above.

O. P. Lord, for the defendants.

Clifford, attorney general, for the commonwealth.

DEWEY, J. The exceptions, taken to the various rulings of the presiding judge, in the present case, are wholly untenable, and many of the points too familiar to require any exposition.

The only exception, to which it is deemed expedient particularly to allude, is that to the ruling of the judge excluding the interrogatory put to a witness on his cross examination: "Whether it was his custom to open the letters of his boarders, and if he knew whether it was right or wrong to

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open and read the private letters of a boarder in his own room." The proposed testimony clearly had no direct bearing on the issue. If competent at all, it was so with a view of exhibiting more fully to the jury the particular opinions of the witness, in respect to his own social and moral obligations to others, as detracting from the credit of the witness. We think the testimony was properly excluded by the presiding judge.

But upon more general grounds, supposing the testimony admissible on cross examination, we think the exception should be overruled. The manner of conducting the examination of a witness, and particularly the course of proceeding in the cross examination, is a matter resting much in the sound discretion of the presiding judge, and the limitation of inquiries in respect to matters irrelevant to the point in issue can be so much more appropriately exercised by him, that it seems to us this must depend very much upon his discretion, he having regard to the appearance of the witness, and his apparent disposition to disclose the whole truth.

The court are of opinion that such ruling, limiting the course of inquiry on a cross examination, and excluding inquiries that are irrelative to the matter in issue, is not subject to exception, and not to be revised in this court. *Commonwealth* v. *Sacket*, 22 Pick. 394. *Exceptions overruled.*

4c 594
156 273
4c 594
173 119

COMMONWEALTH *vs.* WILLIAM P. SHAW & others.

It is the privilege of a witness, and not the right of the party against whom he is called, to object to his giving evidence to criminate himself; and it is not the duty of the judge, upon the interposition of such party, and independent of any objection of the witness, to inform the latter of the rule of law that he is not bound to criminate himself.

ON the trial of this indictment before *Perkins*, J., in the court of common pleas, John B. Frye, who was also indicted for the same offence, was called as a witness for the prosecu-

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tion, and made no objection to testifying. But, before any question was put to him by the district attorney, the defendants' counsel, on their behalf, requested the judge to inform the witness, that he was not bound to criminate himself; claiming it as the right of the defendants to interpose, and to require of the court that this information should be given. The judge refused to give the information, on the claim of right by the defendants to interpose for this purpose, and on their objection, the witness himself making no objection; but the judge did not refuse to give the information requested, on the demand and as the right of the witness.

The defendant, being convicted by the jury, alleged exceptions to the ruling above stated.

O. P. Lord, for the defendants.

Clifford, attorney general, for the commonwealth.

Dewey, J. The privilege of a witness, in not being compellable to answer any questions that may tend to criminate himself, is unquestioned, and was so held by the presiding judge. The only question raised upon this bill of exceptions is, whether the defendant had a right to interpose the objection, and require the judge to state the rule of law on the subject, independent of any objection taken by the witness himself. Upon this point the law is very well settled, that the privilege of declining to answer questions propounded to a witness, on the ground that the answer will have a tendency to expose him to personal liability, or to punishment on any criminal charge, is the privilege of the witness, and not of the party against whom he is called to testify. 1 Greenl. Ev. § 451; *Thomas* v. *Newton*, 1 M. & Mal. 48, note; *Rex* v. *Adey*, 1 M. & Rob. 94. The case of *Commonwealth* v. *Kimball*, 24 Pick. 366, 369, is not in conflict with the principle of law above stated. The court, in giving their opinion in that case, very distinctly assume as a part of the facts in the case, that the objection was taken originally by the witness, and not by the party on trial. A further opinion held in that case was, that if the witness does thus claim his privilege, but the court improperly deny the same, and require the witness to answer, exceptions to such ruling of the court

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may properly be taken by the party on trial. The principle there stated went no further than this, that where the privilege was seasonably claimed by the proper party, and not allowed, the verdict was not obtained upon legal evidence, and therefore might be set aside. It would seem also to be the only mode practicable for revising such decision, thus to present the question upon a bill of exceptions taken by the defendants. The case of the *Commonwealth* v. *Kimball*, however, really required no adjudication upon this point, as the court held, that there was no legal ground for any objections to the ruling of the court of common pleas, the answer of the witness having no tendency to criminate himself. Upon the question now presented, the court are of opinion that there is no ground for sustaining the exceptions.

4c 596
153 102

COMMONWEALTH *vs.* WILLIAM CLARK.

In a complaint for a criminal charge before a magistrate, the year of the alleged offence may be stated by means of the letters A. D., followed by words expressing the year, and the word "and" may be expressed by the sign "&."

THE defendant, having been convicted before a magistrate on a complaint for an assault and battery, appealed to the court of common pleas, where he was tried before *Hoar*, J., and convicted, and then moved in arrest of judgment. The judge overruled the motion, and the defendant excepted.

The grounds of the motion were: 1st. That the time of the alleged offence was stated in the complaint as "the twelfth day of September, A. D. eighteen hundred and forty-nine;" and, 2d. That the word "and" was frequently omitted in material parts of the complaint, and its place supplied by the abbreviation "&."

A. Holbrook, for the defendant.

Clifford, attorney general, for the commonwealth.

BY THE COURT. We are of opinion, that in a complaint before a magistrate, the letters A. D., preceding the words expressing the year, are sufficiently certain, having acquired

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an established use in the English language; and also that the figure "&" may be used in writing to express the conjunction "and." *Exceptions overruled.*

COMMONWEALTH *vs.* JOHN P. LAKEMAN.

One tenant in common of a barn floor has no right to use force and violence, to prevent his co-tenant from entering the door leading to the floor, though such entry is with the declared purpose of removing the wagon of the former then standing on the floor.

THE defendant, having been convicted before a magistrate on a complaint charging him with an assault and battery, appealed to the court of common pleas, where he was tried before *Hoar*, J., and convicted. The case came to this court by exceptions.

On the trial, it was admitted, that the complainant, on whom the assault and battery were alleged to have been committed, was a tenant in common with the defendant of a barn floor and land thereunder; the complainant owning the barn and land on one side of the floor, and the defendant owning the barn and land on the other side of the same. It appeared in evidence, that at the time of the assault and battery, a wagon with hay thereon, belonging to the defendant, was on the barn floor; that the complainant, without having previously requested the defendant to remove his wagon, proceeded with several men to remove it, and on his way to the barn, the complainant threatened in the hearing of the defendant, that he would run out the defendant's wagon; and that the defendant followed the complainant to the barn. The complainant began to open the barn door, leading into the floor, and had partly opened the door, when the defendant arrived at the barn. Immediately upon the defendant's approaching the barn, the complainant said, I am going to run out your wagon. Upon this the defendant resisted the opening of the door, and struck the complainant upon his head, and knocked him down.

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The judge instructed the jury, that the defendant had no right to prevent the complainant from opening the door, although it was done with the declared purpose of running out the defendant's wagon, under the circumstances above stated, each tenant in common having an equal right in the floor.

W. D. Northend, for the defendant.

Clifford, attorney general, for the commonwealth.

By the court. The court are of opinion, that the direction to the jury was right, and that the defendant, as tenant in common of a barn floor, occupied by the complainant and himself, had no right to use force and violence, to prevent his co-tenant from entering the door, though it was for the declared purpose of removing the defendant's wagon; and that such declared purpose afforded no justification for the assault.

Nathaniel S. Sawyer *vs.* Leander Spofford.

Where evidence is given of circumstances tending to prove a sale of a chattel, no presumption arises, that the sale, if made, was an absolute one; but it is to be left to the jury, upon all the evidence, to decide whether it was absolute or conditional; the burden being on him who alleges a sale to prove either an absolute one, or a sale upon a condition precedent, which has been performed.

In this action, which was replevin for a yoke of oxen, tried before *Wells*, C. J., in the court of common pleas, both parties claimed title under Charles Hills, deceased. The plaintiff gave in evidence the declarations of Hills, in his lifetime, that he had sold the oxen to the plaintiff. The defendant suggested, as a part of his defence, and introduced evidence to prove, that if any sale was made by Hills to the plaintiff, it was a conditional sale. The plaintiff thereupon requested the judge to instruct the jury, that if they should be satisfied of a sale and delivery of the oxen to the plaintiff by Hills, such sale was to be taken as an unconditional one; and that if the sale was conditional, the burden of proof was upon the defendant to show the condition. The judge refused so to instruct the jury, but left it to them to determine, upon all

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the evidence, what was the actual contract between Hills and the plaintiff. He also instructed the jury, that the declarations of Hills, and the delivery of the cattle, were only evidence tending to prove that the sale was absolute, to be considered by the jury in connection with the other evidence in the case, and that if an absolute sale was necessary to entitle the plaintiff to recover, it was upon him to satisfy the jury that the sale was absolute.

The jury having returned a verdict for the defendant, the plaintiff excepted to the above ruling.

The case was submitted without argument.

By the court. The direction, we think, was right. The oxen having been the acknowledged property of Hills, they must be deemed his at his decease, unless a change of property was proved. The burden was upon the plaintiff to prove an absolute sale, or a sale upon a condition precedent, and the condition complied with. *Whitwell* v. *Vincent*, 4 Pick. 449; *Reed* v. *Upton*, 10 Pick. 522; *Heath* v. *Randall*, ante, 195. The delivery might be some evidence of an executed sale, but it was far from being conclusive. In all the above cited cases, the property was sold on a condition precedent, and delivered; but it was held that as the condition was not complied with, the property was not changed.

Exceptions overruled.

James B. Batchelder *vs.* The City of Salem.

The power conferred on school committees, by *St.* 1838, *c.* 105, § 2, to "select and contract with the teachers for the town and district schools," includes the power to fix the compensation to be paid them, and to bind the town to pay the same.

This action, which was brought by the plaintiff to recover his salary as principal of one of the grammar schools of the city of Salem, was submitted to the court upon an agreed statement of facts.

The plaintiff was duly appointed principal of one of the grammar schools of the city of Salem on the 21st of December

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1846, and immediately entered on the duties of the office, and continued to discharge them until the 1st of December, 1847. The salaries of the principals of the grammar schools were duly established at $700 a year, on the 6th of January, 1839, and were so continued, without any change, and without any action of the school committee thereon, until the 1st of June, 1847, when the committee, at a meeting duly called for the purpose, passed the following vote: "That the salaries of the teachers of the grammar schools be hereafter $800 per year, and that the salaries of the assistant teachers, and of the teachers of the primary schools, that have been $150, be hereafter $200 per year." The municipal year commenced on the 1st day of April.

It was admitted, that the plaintiff was entitled to recover at the rate of $700 a year, and that the defendants paid into the court below, by leave of the court, at the June term, 1848, the sum of $304, which was the full amount due the plaintiff, unless he was entitled (which was denied by the defendants) to recover a further sum under the vote of the school committee, before recited, of June 1st, 1847.

The amount specially appropriated by the city council of Salem for the salaries of teachers for the municipal year 1847 was $17,025, and the amount actually paid during the the same year was $16,326·43. But there was due and unpaid, at the close of that year, for the salary of the plaintiff, the sum of $304, and there were occasional vacancies in some of the schools, in the office of assistant teacher, during the year, but for which the amount specially appropriated would have been expended. The salaries of all the teachers, under the vote of June 1st, 1847, would have amounted to $18,500, exceeding the amount actually appropriated for that purpose $1875.

A. Holbrook, for the plaintiff.

O. P. Lord, for the defendants.

The opinion of the court was delivered at the October term, 1850.

Fletcher, J. The important question, in this case, is whether the plaintiff is entitled to the salary of $800, according

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to the vote of the committee of June 1st, 1847. It is not denied, that it was the intention of the committee, by their vote, to contract, and that they did thus contract, with the teachers for their salaries; but it is denied, that this contract was binding on the city.

It is maintained, on the part of the defendants, that they alone have the power of determining the amount of money which shall be raised for teachers; that the committee, in making their contracts with the teachers, must keep within the amount appropriated to this object by the city; that the committee have no power to bind the city beyond the amount which the city may think proper to raise; and, in fact, that the power of the committee may be limited, restricted, or taken away by the city.

The powers of school committees are expressly given and particularly specified and defined by statute. The inhabitants of any town, at their annual meeting, are to choose, by written ballots, a school committee, consisting of three, five, or seven persons.

Special provisions for cities, in regard to the number of the school committee, and the manner in which they shall be chosen, are contained in the respective charters.

The powers to be exercised by this committee are given in the most general terms. They are to "have the general charge and superintendence of all the public schools in the town." Rev. Sts. *c.* 23, § 10. The school committee have the whole power to examine teachers, and no one can legally be a teacher in any public school, until he has received from the school committee a written certificate of his qualification. The school committee are to select and contract with the teachers of the town and district schools. *St.* 1838, *c.* 105, § 2. This power is expressly given by the statute. It is given in positive and unqualified terms. By this statute, the committee has the power, absolutely and unconditionally, to agree upon the salaries of the teachers. There is no power given to any other men, or body of men, to contract with the teachers, and this power is given by the statute, and not by the town or city.

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This general position is, of course, to be taken with the exception of the provision by statute, that the power of selecting and contracting with teachers may, by express vote of the town, be transferred from the superintending to the prudential committee; but that was not done in this case.

There are very obvious and strong reasons for intrusting this power exclusively to the committee. The committee have the general charge and superintendence of the schools; they judge of the qualifications of the teachers; they select the teachers for particular schools with direct reference to their fitness for those schools. But the power to select would be vain and nugatory without the power to fix the compensation. Whether a suitable teacher can be obtained for a particular school, will depend on the compensation offered. Whether a teacher shall be a person of high qualification or low qualification, whether the schools shall be good schools or poor schools, depends on the amount of compensation. Take away from the committee the power to fix the salaries of the teachers, and you take away from them the power to perform the duties, which the legislature have imposed on them.

The legislature have imposed on the committee the duty of seeing to it that the public schools are in a condition and of a character best calculated to advance the improvement and promote the good of the pupils. The character of the schools will depend on the character of the teachers, and the character of the teachers will depend on the compensation. The power to fix the compensation is chiefly intrusted to the committee, for the full, appropriate, and most useful discharge of their duties. This power the legislature, for the most satisfactory and conclusive reasons, have expressly given to them.

How can the city deprive the committee of a power expressly given by the legislature? To say that the city is not bound to pay according to the contract of the committee, would be in effect to say, that the committee had no power to contract. It is said, that the inhabitants of a town or city have the power of determining the amount of money they will raise for schools. But this proposition cannot be maintained in

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this general and unqualified form. The obligations, imposed on towns by the statute, are to provide schools of certain grades for certain prescribed lengths of time; and beyond these periods the law imposes no obligation. The law prescribes no amount of money which shall be raised, and fixes no limits to the amount which it may be necessary to raise. Towns are obliged to maintain schools for certain periods during the year, and the committee have the power to select and contract with the teachers. For the time during which the towns are obliged by law to keep the schools, they must pay such salaries as may be contracted for by the committee. The salaries can be fixed by law in no other way than by the committee. Taking this power away from the committee would break up the whole system established by law in regard to the public schools.

Whether there shall be any schools kept beyond the time required by the statute, is a matter depending wholly on the will and pleasure of the inhabitants of the towns. If the schools are continued, there is no one authorized by law to select and contract with the teachers but the committee. If the salaries contracted for by the committee are thought to be onerous, the town can stop the schools after the expiration of the time required by law. The only way left open by the statute for the town to reduce the expenses is not to continue the schools beyond the time required by the statute. There is no provision for the town to reduce the salaries, or to interfere with the contract made by the committee with the teachers.

But it is in the power of towns to resolve not to continue their schools beyond the limited period, during which the law expressly requires that they should be continued. Beyond these required periods, the towns have the power of controlling and limiting the times of keeping their schools, and in this way of controlling and limiting the amount of money to be raised for schools, though the towns have the right of raising as much money for this object as they may think proper, beyond what is positively required by law. The law fixes the smallest amount of instruction to be provided by

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towns, leaving with towns the right to provide such further amount as they may think proper. In point of fact, the towns in the commonwealth, with very few if any exceptions, tax themselves for an amount of instruction very much beyond what is required by law. They act in this matter from higher and nobler motives and considerations, than merely the consideration of their strict legal obligation.

The plaintiff in the present case was permitted to go on in the discharge of his duties in his school, relying on his contract with the committee for his increased compensation, without any objection on the part of the defendants, who took no measures and intimated no wish to discontinue or terminate the school, and gave no notice to the plaintiff that his services were not wanted. The plaintiff, having performed the services sued for, in pursuance of a valid contract with the committee, the defendants are bound to pay him his compensation, according to the sum fixed by the committee, June 1st, 1847; the committee having full legal authority to make that contract, and by which, of course, the defendants are bound.

CHARLES STODDARD & another *vs.* JOHN KIMBALL.

4c 604
158 97

It is no defence to an action by the indorsee of a note against the indorser, that the note was indorsed by the defendant without consideration, for the accommodation of the payee, and delivered to him for the purpose of being used to take up another note of the same parties, but that instead thereof, the payee passed the note to the plaintiff, before its maturity, as collateral security for a pre-existing debt; unless it be shown also that the plaintiff knew of the special purpose for which the note was delivered to the payee.

THIS action was brought by the plaintiffs, as indorsees, against the defendant, as indorser, of a promissory note, signed by W. C. and A. S. Kelly, payable to the order of Kelly and Reed, and by them indorsed. The note was dated June 20th, 1845, payable in six months at either of the banks in Boston, for $483·94.

At the trial, before *Bigelow*, J., in the court of common pleas, the defendant having admitted the signing of the note

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by the makers, the indorsement of it by himself, and due demand and notice, offered evidence to prove, that the note was indorsed by him for the accommodation of Kelly and Reed, the payees, without any consideration; that it was delivered to one of the firm of Kelly and Reed, for the special and sole purpose of taking up another note, made by the same parties, and also indorsed by the defendant for the accommodation of Kelly and Reed, for the sum of $523, dated June 10th, 1845, and which matured on the 13th of September, 1845; that Kelly and Reed, instead of using the note for the purpose aforesaid, passed it to the plaintiffs as collateral security for a preëxisting debt due to them from Kelly and Reed, and also to release an attachment of the goods of Kelly and Reed, which the plaintiffs had caused to be made for the purpose of securing such preëxisting debt.

Upon these facts, the presiding judge instructed the jury, that if they should be satisfied by the evidence, that the note in question was indorsed by the defendant, without consideration, for the accommodation of Kelly and Reed; and was delivered to them for the sole and special purpose of being used by them to take up the note aforesaid of June 10th, 1845; and that the note so indorsed and delivered to Kelly and Reed was passed by them to the plaintiffs, as collateral security for a preëxisting debt, and to release an attachment made by them to secure such debt; then the note was not received by the plaintiffs in the usual and ordinary course of business, and they were not entitled to recover the amount thereof of the defendant.

The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

The case was submitted without argument.

By the court. The case discloses no evidence tending to show, that the plaintiff knew that the note was delivered by the defendant to Kelly and Reed, for the special and sole purpose of taking up another, and was by them, in violation of that trust, applied to a different purpose. The note was not overdue, on the contrary it had several months to run, bore no evidence of being dishonored, and was taken by the plaintiffs

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for a valuable consideration, on giving up another available security. The facts relied on, without proof affecting the plaintiff with notice of them, cannot, we think, be a ground of defence.

If, as between the defendant and Kelly and Reed, of whom the plaintiff took the note, and to whom alone he is accountable for the proceeds, it was an accommodation note, perhaps the plaintiff must be considered as a holder for value, only for the amount necessary to reimburse him for his advances on it for Kelly and Reed, or the debt for which he took it of them as security; and if the whole amount of the note is not necessary for that purpose, the defendant may have the difference deducted in the assessment of damages.

Exceptions sustained.

4c 606
151 385
4c 606
176 540

EDWARD B. WHEELER & another *vs.* CHARLES N. SOUTHER.

The payee of an order not negotiable, payable out of a particular fund, and not expressed to be for value received, which has never been presented for acceptance or payment, cannot maintain an action thereon against the drawer, upon proof that the latter, after the commencement of the action, admitted the amount to be due from him to the payee.

THIS action was brought by the payees against the drawer of an order, of which the following is a copy:—

"Mr. T. W. Herrick. Please pay to Messrs. Wheeler & Morton forty-two $\frac{23}{100}$ dollars, and charge same to the account of the house building on lot No. 16, on plan of Webster place, Newton, which is in your hands for sale.

NEWTON, Dec. 23, 1845. CHARLES N. SOUTHER."

The declaration contained the common money counts, and also a count on the order.

The case was submitted to the court of common pleas, and by appeal to this court, upon the testimony of a witness, who stated, that after the writ had been made and given to an officer for service, the witness accompanied the officer to the defendant's store, and there had a conversation with the defendant, in which the latter admitted that the amount of

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the order was due from him to one of the plaintiffs, and said that he should pay the same at some time, although he was not then able to do so.

The case was submitted without argument.

FLETCHER, J. There must be a nonsuit of the plaintiffs entered in this case, and judgment thereon for the defendant. The burden of proof is on the plaintiffs, and they have failed to sustain that burden, by any satisfactory proof of their claim against the defendant. There is no proof, that the order was ever presented to the drawer for acceptance or payment, and no evidence of any notice to the defendant of non-acceptance and non-payment. The order is not a negotiable paper, being payable out of a particular fund; there is no value expressed as received, and no promise to pay. The admission of the defendant of being indebted is quite too loose and uncertain, and better evidence, surely, might have been offered, if there was in fact a debt due. The plaintiff is bound to make out his claim satisfactorily, but fails to do so, and must thereupon fail to recover of the defendant.

JOHN B. SAVORY *vs.* JOHN W. STOCKING.

A discharge in bankruptcy, taking effect on the 28th of June, 1842, is not a bar to the recovery of a quarter's rent falling due on the 9th of July following, the bankrupt having occupied the premises to the end of the quarter.

4c 607
146 114

THIS was an action of debt, to recover one quarter's rent due on the 9th of July, 1842, on a lease for years dated July 9th, 1841, reserving rent payable quarterly. The defence was a discharge duly obtained by the defendant under the bankrupt law of the United States, for the benefit of which he petitioned on the 28th of June, 1842. The defendant occupied the premises until the 4th of August, 1842, which was the date of the writ, and was then ejected by the statute process of forcible entry and detainer.

There was no appearance for the plaintiff.

J W Perry, for the defendant.

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FLETCHER, J. The discharge in bankruptcy does not discharge this claim, and the plaintiff must have judgment for one quarter's rent. The petition in bankruptcy was on the 28th of June, 1842. The quarter under the lease expired and the rent for the quarter now claimed became due on the 9th of July, 1842. This was not a debt due at the time of the discharge, nor was it a contingent debt within the meaning of the bankrupt law, because the claim is in part for the occupancy of the premises by the bankrupt after the discharge, and though that part be but a small part, it does not affect the principle. The assets of the bankrupt cannot be charged for the occupancy of the bankrupt after the time of the discharge. *Hendricks* v. *Judah*, 2 Caines, 25; *Bosler* v. *Kuhn*, 8 W. & S. 183.

ISAAC S. LORING *vs.* JOSEPH W. ABORN.

If the defendant, in an action of trespass for an assault and battery, pending in the court of common pleas, having obtained the right to open and close, by filing an admission under the forty-first rule of that court, justify the trespass, on the ground of lawful authority, the burden of proof will be on him to show that he did not use more force than was necessary.

THIS was an action of trespass for an assault and battery, tried before *Mellen*, J., in the court of common pleas. The alleged assault was committed in putting the plaintiff out of a railroad car, of which the defendant had charge as a conductor, on the Boston and Maine Railroad, from Lawrence to North Andover. The defendant justified, on the ground, that the plaintiff refused to give up his ticket, as required by the regulations of the railroad; and he also filed an admission, under the forty-first rule of the court of common pleas, to entitle himself to the opening and close of the case. The presiding judge ruled, that the defendant's admission was sufficient for this purpose, and the trial proceeded accordingly; but he instructed the jury, among other things, that the burden of proof was on the plaintiff to prove that the

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defendant used more force than was necessary to expel the plaintiff from the cars. The defendant having obtained a verdict, the plaintiff excepted.

N. W. Harmon, for the plaintiff, cited *Imason* v. *Cope*, 5 C. & P. 193; *Simpson* v. *Morris*, 4 Taunt. 821.

G. Minot, for the defendant, cited *Oakes* v. *Wood*, 2 M. & W. 791, 797; *Penn* v. *Ward*, 2 C. M. & R. 338.

FLETCHER, J. The verdict in this case must be set aside, for the reason that the instruction of the court below, that the burden of proof, as to the excess of force used on the plaintiff, was erroneous. The defendant having obtained the opening and close, took upon himself the burden of proof, to justify all he did, to make out a good justification throughout. Such was the decision in the case of *Hannen* v. *Edes*, 15 Mass. 347, under the old system of pleading, and on technical grounds. But here the case is much stronger, because the defendant voluntarily assumes the general burden of making out a full justification of all he did, and for that purpose obtained the right to open and close.

DAVID GRAY *vs.* THE LOWELL & LAWRENCE RAILROAD COMPANY.

Where the estimate of a petitioner's damages, occasioned by the construction of a railroad, as made by the county commissioners, is revised by a jury, on the application of the petitioner, and the amount reduced, and the verdict of the jury is accepted by the court of common pleas, neither party is entitled to recover the costs of the hearing before the jury. If, in such case, the court of common pleas award judgment for costs to the petitioner, and the respondents appeal therefrom to this court, the respondents will be entitled, on the reversal of the judgment of the court of common pleas, as to costs, to recover the costs of the appeal, and also their costs in this court.

THE petitioner applied to the county commissioners to assess his damages caused by the location and construction of the respondents' railroad over and across his land. At the hearing before the commissioners, at the July term, 1847, they awarded that the petitioner should recover as damages

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the sum of $1480, and further awarded that the respondents should build and maintain a good and substantial bridge not less than fifteen feet wide over their road, for the use of the petitioner, his heirs and assigns, and also a good and convenient farm crossing over the grade of their road near the base of the hill. From the decision of the county commissioners, the petitioner appealed and petitioned for a jury, which was ordered and met on the 18th of August, 1848, and, after hearing the case, returned a verdict for the petitioner, awarding him damages in the sum of $820, with interest from June 15th, 1847, and upon the same condition and stipulation as to building a bridge by the railroad company across the railroad, as the commissioners had made in their report.

This verdict was returned to the court of common pleas, and was accepted. Whereupon both parties claimed the costs of the hearing before the jury. The clerk taxed the costs on both sides, and the court decided, that the petitioner was entitled to recover his costs of the respondents; from which decision the respondents appealed to this court.

N. J. Lord, for the respondents.

W. D. Northend, for the petitioner.

Fletcher, J. The judgment of the court of common pleas, as to costs, must be reversed. Neither party is entitled to recover the costs of the hearing before the jury. The respondents are entitled to recover, and must have judgment for, the costs of their appeal to this court, and for their costs in this court. This case comes so fully and precisely within the decision of this court, in the case of *Commonwealth* v. *Boston & Maine Railroad*, 3 Cush. 25, 56, that it is only necessary to refer to the opinion of the court in that case, as stating particularly and fully the grounds of the decision in this case.

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2. A husband, whose wife has been injured by reason of a defect in a highway, cannot maintain an action against the town, obliged by law to repai. the same, to recover for medical and other expenses incurred, or for loss of his wife's services, in consequence of such injury. *Harwood* v. *Lowell*, 310.
3. The payee of an order not negotiable, payable out of a particular fund, and not expressed to be for value received, which has never been presented for acceptance or payment, cannot maintain an action thereon against the drawer, upon proof that the latter, after the commencement of the action, admitted the amount to be due from him to the payee. *Wheeler* v. *Souther*, 606.
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ACTION ON THE CASE.

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See PROBATE COURT, 2.

ADMISSIONS.

See ACTION, 3; EVIDENCE, 4, 5; PROMISSORY NOTE, 4.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

ALIMONY.

Scire facias is a proper process to enforce payment of arrears of alimony. *Morton* v. *Morton*, 518.

AMENDMENT.

1. Where an action of trespass *de bonis asportatis* was brought in the name of the elder and deacons of a church, and it appeared, upon the report of an arbitrator to whom the action was referred, that the property, in respect of which it was brought, had been purchased with funds belonging to the church, and in the name of the church, or had been given or otherwise granted to the church, and that the elder had not been joined or named in any deed or grant relating thereto; it was held, that the deacons alone constituted the corporation with respect to such property (Rev. Sts. c. 20, §§ 39, 40), in whose name the action should have been brought, and that the writ might be amended in this court, by striking out the words "elder and," under the several statute provisions authorizing amendments. *Free-will Baptist Church in Lowell* v. *Bancroft*, 281.
2. After the death of a defendant is suggested on the record, no amendment can be made so as to alter the character of the action, until the appearance of a representative. *Smith* v. *Sherman*, 408.

See PLEADING, 8.

APPEAL.

1. When the decree of a judge of probate, appointing an administrator, is appealed from, the authority of such administrator is thereby suspended, and any further proceedings by him in that capacity are irregular. *Arnold* v. *Sabin*, 46.

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2. An administrator, appointed in another state, on the estate of a person there deceased, may appeal from the decree of a judge of probate in this state, appointing an administrator here. *Smith* v. *Sherman*, 408.

See SHERIFF'S JURY, 5.

AQUEDUCT CORPORATION.

If an aqueduct corporation, established for the purpose of supplying a village with pure water, should undertake, capriciously and oppressively, to enhance the value of certain estates by furnishing them with a supply of water, and depreciate that of others by refusing it to them, such conduct would be a plain abuse of their franchise. *Lambard* v. *Stearns*, 60.

See EMINENT DOMAIN, 2.

ARBITRAMENT AND AWARD.

1. Where a case is referred to arbitrators, to report a statement of facts for the consideration of the court, they have no authority to admit the parties as witnesses. *Fowler* v. *Thayer*, 111.
2. If two arbitrators, named by the parties to a submission, are authorized, in case they shall not agree, to "select a third man to act as a third referee," such referee may be appointed before the arbitrators proceed. *Bigelow* v. *Maynard*, 317.
3. The boundary line, between adjoining proprietors of land, may be ascertained and fixed, by the award of arbitrators appointed for the purpose. *Clark* v. *Burt*, 396.
4. An award, establishing a boundary line, from one known monument to another, *by land of one of the parties*, is void for uncertainty, as to the line so described. *Ib.*
5. Where it was referred to arbitrators to determine to what extent a building contract had been performed by one of the parties, and what deduction should be made in favor of the other, and what balance should be due to the former; an award, that a balance of a certain sum was due, was held to be sufficient, without specifying what deduction should be made from the sum named in the contract. *Bigelow* v. *Maynard*, 317.
6. Where the terms of a submission are general, of all matters and things whatsoever in dispute between the parties, an award of a certain sum of money, to be paid by the defendant to the plaintiff, is sufficiently certain, and a good execution of the submission. *Shirley* v. *Shattuck*, 470.
7. Arbitrators have no authority in this commonwealth to award costs of arbitration, if no provision is made in the submission to that effect. *Ib.*
8. Where arbitrators awarded that the plaintiff should recover of the defendant a certain sum of money, and one half of the costs of arbitration, amounting to a sum stated, which they included in the first-named sum, and they had no authority to award concerning costs, it was held, that the award was divisible, and that the part relating to costs might be rejected, and the residue held good. *Ib.*
9. Where a submission to arbitration was entered into by mutual bonds between N. and M., the condition of one of which was, that N. should

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discharge and release M. from all liability, on payment to him of the sum awarded, "after discharging all trustee processes now or then pending by said N., so that said M. shall be free to pay said sum;" and the condition of the other was, that M. should pay the sum awarded to N., "provided all trustee processes now or then pending are first arranged, by said N., so as to relieve said M.;" it was held, in an action of debt on an award under this submission, by the assignee in insolvency of N., against M., that the payment to the defendant of his costs in certain trustee processes, which were pending at the time of the submission, and in which he had been discharged as trustee by the insolvency of N., was not a condition precedent to his obligation to perform the award. *Bigelow* v. *Maynard*, 317.

See EVIDENCE, 3, 4, 5.

ARBITRATOR.

See ARBITRAMENT AND AWARD.

ASSAULT AND BATTERY.

One tenant in common of a barn floor has no right to use force and violence, to prevent his co-tenant from entering the door leading to the floor, though such entry is with the declared purpose of removing the wagon of the former then standing on the floor. *Commonwealth* v. *Lakeman*, 597.

See BURDEN OF PROOF, 2.

ASSESSORS.

The provision of the Rev. Sts. c. 7, § 44, exempting assessors from all responsibility, except "only for the want of integrity and fidelity on their own part," does not extend to the assessment of a school district tax, where the district has no legal existence. *Bassett* v. *Porter*, 487

ASSIGNEE IN INSOLVENCY.

See SALE, 2.

ASSIGNMENT.

1. A mortgagee of personal property may make an equitable assignment of his mortgage, which courts of law will take notice of and protect, by a delivery of the deed to the assignee, without writing, for a valuable consideration. *Crain* v. *Paine*, 483.
2. Where an order, not negotiable, drawn by a debtor, without consideration, in favor of his minor daughter, for money to become payable to him from a third party, and accepted by the latter, is afterwards indorsed by the daughter, at the father's request and for good consideration received by him, but without the knowledge of the third party, to another person, these facts constitute no such assignment, as will enable him to hold the money against other creditors of the debtor. *Brown* v. *Foster*, 214.

See DEED, 8; PLEADING, 1, 2.

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ASSUMPSIT.

1. The proprietors of a toll bridge may maintain an action of assumpsit, as on an implied promise, against any one passing over the bridge, who is liable by law to pay toll; although the defendant has always claimed an exemption from such liability, and refused to pay the tolls. *Central Bridge* v. *Abbott*, 473.

2. If two persons enter into an agreement in writing, under seal, with a third, that the latter shall sell and convey to one of them a certain lot of land, at a specified price, to be paid for in part by the work of the other, which he binds himself to perform, and in part by the grantee, without any stipulation that the latter shall pay the former for the work so done, the law implies a promise, on his part, to pay a reasonable compensation therefor. *Blaisdell* v. *Gladwin*, 373.

3. The defendant having received several demands from a debtor of the plaintiff, and agreed to collect the same, and, out of the proceeds, to pay four certain creditors of such debtor, of whom the plaintiff was one, their several claims, and having collected one of the demands; but it not appearing how large the claims were which the defendant was to pay, or whether either of them was entitled to priority, or had been paid, or to what sum the demands left with the defendant for collection amounted, or that he had collected any other than the one named; it was held, in an action of assumpsit on the money counts to recover the amount so collected, that the plaintiff must show either that the defendant had received the same under an agreement to appropriate it specifically to the plaintiff's debt, or that he had collected enough to pay all the demands which he had assumed to pay. *Filch* v. *Chandler*, 254.

See INNKEEPER; LANDLORD AND TENANT, 1; MILL, 1; MORTGAGE, 2.

ATTACHMENT.

1. If an officer enters a building, in which property is stored, and makes a public declaration that all the property therein is attached, and locks up the building, and gives the key to a clerk of the owner, with directions, assented to by the clerk, to keep the property for the officer, these facts constitute a valid attachment of the property in the building. *Shephard* v. *Butterfield*, 425.

2. Where property in a building was attached, and the officer, afterwards, without intending to abandon the attachment, took all the care and custody of the articles, which, from their bulky nature and small value, could reasonably be required, notwithstanding which, the debtor obtained access to the building, and mortgaged the property to a creditor, who, before recording his mortgage, had knowledge of the attachment; it was held, that there was no abandonment of the attachment which the mortgagee could take advantage of. *Ib.*

3. If bulky articles of property are attached in an open shed, and left there by the officer, without any further actual charge of the same, or notice of the attachment posted up, by him, the attachment is thereby lost, even as against a party having notice. *Ib.*

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4. When property attached is receipted for and redelivered to the debtor the receipter is liable therefor to the officer, whether, by the receipt and redelivery, he becomes the bailee and servant of the officer, to keep the goods as in the custody of the law, or an original contractor, bound, at his peril, to have the goods forthcoming according to the terms of the receipt. *Wentworth* v. *Leonard*, 414.

5. Where the signer of a receipt for goods attached promised thereby to keep the goods safely, and to redeliver them to the officer or his order, on demand, and, also, that if no demand were made upon him, he would, within thirty days from the rendition of judgment, redeliver the goods, in order that they might be taken on the execution; it was held, that the officer might commence an action on the receipt, after the thirty days had elapsed, without previous demand. *Ib.*

6. Property exempt from attachment. See EXECUTION, 1.

7. Remedies against officer attaching such property. See TRESPASS; TROVER, 1.

See INSOLVENCY PROCEEDINGS, 1, 2; MORTGAGE, 6; TRUSTEE PROCESS, 4.

ATTORNMENT.

See LANDLORD AND TENANT, 1.

AWARD.

See ARBITRAMENT AND AWARD.

BANK.

Where bank shares are seized and sold by a collector of taxes, in the manner provided by the act of 1846, c. 195, on a warrant from assessors having jurisdiction of the subject matter, and *prima facie* a lawful authority to issue such warrant, and there is nothing on the face of the proceedings to indicate any want of jurisdiction, or any error or defect therein; the cashier of the bank is authorized (if not required) to issue a new certificate of such shares to the purchaser, who will thereupon become entitled to accruing dividends, whether the tax, for the payment of which the shares are sold, be rightly assessed or not. *Smith* v. *Northampton Bank*, 1.

See TRUSTEE PROCESS, 1.

BANKRUPTCY.

A discharge in bankruptcy, taking effect on the 28th of June, 1842, is not a bar to the recovery of a quarter's rent falling due on the 9th of July following, the bankrupt having occupied the premises to the end of the quarter. *Savory* v. *Stocking*, 607.

See PRACTICE.

BANKRUPT LAW.

1. A sale of a bankrupt's real estate, under an order of the district court of the United States, in which no time or place of sale is fixed by the court, is irregular and void. *Osborn* v. *Baxter*, 406.

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2. The discharge of a bankrupt, under the late bankrupt act of the United States, may be impeached by proving unlawful preferences and payments, made by him in fraud of the act, between the day when the same was passed, and the day when it took effect. *Swan* v. *Littlefield*, 574.

BILL IN EQUITY.

Where a town was divided, and a part of it established as a new town, after the commencement of a suit in equity by such town against a railroad corporation, for a nuisance to a public highway, which, upon the division, fell within the limits of the new town, and the act for the division provided that such suit should be assumed, and might be prosecuted to final judgment, by the new town, at their expense and for their benefit, but in the name of the old town; it was held, that the division did not operate to vacate or otherwise affect the suit. *Springfield* v. *Connecticut River Railroad*, 63.

BILL OF EXCHANGE.

The indorser of a bill of exchange, for the accommodation of the drawer, payable in six months from date, is liable as indorser upon non-payment and notice, although the bill is not presented for acceptance, and protested for non-acceptance, and notice thereof given to the indorser, until five months after its date. *Oxford Bank* v. *Davis*, 188.

BLACKSTONE CANAL.

The Blackstone Canal Company were incorporated by an act of the legislature, for an unlimited period, with authority to locate and construct a canal down the valley of the Blackstone river, from Worcester to the state line, and, for that purpose, to appropriate the ponds on or near the route of the canal as reservoirs, paying all damages occasioned by the construction of such canal or reservoirs, or by flowing resulting therefrom, to be estimated and adjusted in the manner provided in the act of incorporation, and with authority also to erect mills and other works on the waters connected with the canal: In locating the canal, they established as a reservoir and a part of the canal a pond raised by the respondents for the use of their mill by erecting a dam across the Blackstone river: The complainant, whose land was flowed by the dam, and who had not previously demanded or been paid any damages therefor, after such location, presented his claim for damages against the canal company, and was allowed and received a certain sum in gross, for the flowing of his land, which was declared to be perpetual: The canal company were afterwards authorized by the legislature to sell and convey their entire property, or any part of it, in the canal, for the purpose of a railroad from Worcester to Providence; such conveyance to vest a good title in the purchaser, though a change of the use of the canal to other public purposes might follow; and not to work a forfeiture of any of the vested rights of the company to the dams located to maintain a head of water, though the canal might be discontinued as a public navigable highway: The act also provided that the dams erected in the bed of the Blackstone river might be main

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tained by the several mill owners, for their exclusive benefit, at the same height to which they had been raised; and that such land as should not be so sold should revert to the original owners divested of the easement: The canal company accordingly made a sale and conveyance, of all their property in the canal and its appendages in Massachusetts, to the Providence and Worcester Railroad Company, for the purposes of a railroad; reserving to themselves all the reservoirs, the dams erected on the Blackstone river, and the waters therein; and saving the right and privilege of all persons to draw or conduct water through the canal for mill purposes, irrigation, or otherwise: The Blackstone canal, — so far as the same was within this commonwealth, — from the time of such conveyance, was discontinued as a navigable canal, although portions of it remained susceptible of such use, and had been principally filled up by the railroad company, or by the original proprietors: In a complaint for the flowing of the complainant's land by the respondent's dam and pond, subsequently instituted, it was held: (1.) That the canal company, by establishing the respondents' dam and pond as a reservoir, and the latter as a section of their canal, and paying the damages therefor, acquired the same right as if they had themselves built the dam and formed the reservoir; (2.) That the canal company, having the right to erect and maintain mills, had a right to adopt the respondents' dam and pond, as well for that purpose, as for the supply of the canal with water; and having adopted the same, and given public notice thereof, the complainant's claim for damages embraced all the damages done to his land by flowing, for all the uses to which the company had a right to apply the water; (3.) That the legislature might authorize the canal company to sell the property of the canal, and to discontinue the same, retaining their corporate existence and powers, in other respects; and, (4.) That the complainant, having claimed and received of the canal company a gross sum in damages for the right of flowing his land, as a perpetual easement, for purposes of a public or *quasi* public nature, the same thereby became annexed to the mill privilege, free from all further claim for damages occasioned by such flowing. *Chase* v. *Sutton Man. Co.* 152.

BOUNDARY.

See ARBITRAMENT, &c., 3, 4; DEED, 7.

BREACH OF PROMISE OF MARRIAGE.

See MARRIAGE.

BURDEN OF PROOF.

1. Where evidence is given of circumstances tending to prove a sale of a chattel, no presumption arises, that the sale, if made, was an absolute one; but it is to be left to the jury, upon all the evidence, to decide whether it was absolute or conditional; the burden being on him who alleges a sale to prove either an absolute one, or a sale upon a condition precedent, which has been performed. *Sawyer* v. *Spofford*, 598.
2. If the defendant, in an action of trespass, for an assault and battery,

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pending in the court of common pleas, having obtained the right to open and close, by filing an admission under the forty-first rule of that court, justify the trespass, on the ground of lawful authority, the burden of proof will be on him to show that he did not use more force than was necessary *Loring* v. *Aborn*, 608.

BY-LAW.

See Parishes, &c., 1, 2; Power.

CANAL.

See Blackstone Canal.

CARRIER.

See Innkeeper; Railroad Corporation, 2, 3.

CITY.

See Contract, 4; Estoppel; Power; Way, 7.

COLLATERAL SECURITY.

See Insolvency Proceedings, 9; Promissory Note, 5

COLLECTOR.

A collector of taxes, under a warrant from the assessors, in which the time for the completion of the collection of the taxes therein mentioned is specified, may arrest a person for the non-payment of his tax, after the expiration of the time limited in the warrant. *Bassett* v. *Porter*, 487.

COMMISSIONER OF INSOLVENCY.

See Insolvency Proceedings, 10.

COMPLAINT.

In a complaint for a criminal charge before a magistrate, the year of the alleged offence may be stated by means of the letters "A. D.," followed by words expressing the year; and the word "and" may be expressed by the sign "&." *Commonwealth* v. *Clark*, 596.

See Malicious Prosecution, 5; Pleading, 8.

CONDITION.

1. Where a forfeiture of land is claimed by the grantor for breach of a condition subsequent, in the performance of which he has no interest, having parted with the estate for the accommodation of which it was created, the terms of the condition are to be construed with great strictness. *Merrifield* v. *Cobleigh*, 178.
2. The owner of a lot of land made a deed of a small parcel thereof, with a house thereon, reserving to himself the privilege of a bridle road in front of the house, and not to be at any expense in supporting a fence around the land conveyed; and whenever the grantee, his heirs or assigns should neglect or refuse to support the fence, then the deed to be void; and

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subsequently conveyed the residue to one who removed the fence without replacing it, and reconveyed such residue to the grantor, who afterwards entered upon the small parcel claiming a forfeiture thereof for breach of the condition: It was held, that the condition, if not merely personal, being designed to benefit the grantor, as owner of the residue of the lot, attached to such residue, and passed to the grantee thereof, whose removal of the fence was an extinguishment or waiver of the condition; which, being thus determined, could not be revived by the reconveyance. And the reconveyance having been in mortgage, it was held, further, that it was immaterial in this respect, whether the removal of the fence took place before or after the execution of the mortgage. It was held, also, that until reasonable notice given, or request made, and neglect or refusal of the grantee, to replace the fence, there was no neglect or refusal to support the fence, within the terms of the condition. *Ib.*

See ARBITRAMENT AND AWARD, 9.

CONFLICT OF LAWS.

See MARRIAGE, 1.

CONSIDERATION.

See CONTRACT, 5; PROMISSORY NOTE, 1.

CONSTABLE.

See SHERIFF'S JURY, 2.

CONSTITUTIONAL LAW.

See EMINENT DOMAIN.

CONSTRUCTION.

Of By-law. See PARISHES, &c., 2.
Of Contract. See CONTRACT.
Of Deed. See DEED, 5–8; CONDITION.
Of Lease. See LANDLORD AND TENANT, 2, 3, 4, 6; LEASE.
Of Statutes. See STATUTE.
Of Vote. See CORPORATION.

CONTRACT.

1 Where two parties enter into a mutual agreement, which is evidenced by a paper signed by each and given to the other, the two instruments are to be taken and construed together as one. *Hunt* v. *Frost*, 54.

2. If two deeds or instruments are executed at the same time, between the same parties, and respecting the same subject, the terms of one of them may be considered in construing the other, if the terms of the latter are ambiguous. *Cloyes* v. *Sweetser*, 403.

3. A contract for building and grading a section of a railroad provided, that for the services performed under the contract, the contractor should be paid monthly, upon a certificate by the engineer of the road of his estimate of

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the work done, three fourths of the same, one fourth being retained until the work should be completed, and accepted by the engineer; and that in a certain contingency, the employer might determine the contract to be abandoned by the contractor, in which event the contract should be void, and any balance due the contractor should be forfeited to the employer: after the contractor had performed one month's service, and part of a second, and had been paid three fourths of the first, the employer determined that the contract had been abandoned by the contractor. It was held, that nothing was due from the employer to the contractor. *Hennessey* v. *Farrell*, 267.

4. Where an individual made a contract in writing to build two drains for a city, in a thorough, skilful, and workmanlike manner, satisfactory to the committee of the board of aldermen having the same in charge; to execute the work under the general direction and superintendence of the committee; and to cause the work to be carried forward and finished with as much rapidity as could reasonably and beneficially be done: It was held, that such general direction and superintendence were not limited to the quality of the materials, and the manner of doing the work, but also extended to the time of doing the same; as to which, the committee, acting with an honest and just regard to the interests of the city, and not arbitrarily, capriciously and unreasonably towards the other party, were exclusively authorized to judge. *Chapman* v. *Lowell*, 378.

5. The owner of a patent right, having given the plaintiff a power of attorney to prosecute for an infringement thereof, with a right to retain one half of what he might so obtain for his services and expenses, subsequently sold the patent, together with the claim for infringement, to the defendant, with authority to revoke the plaintiff's power, upon paying him for his services; and the defendant thereupon gave the plaintiff notice of his wish to revoke the power, and requested him to stop all further proceedings, and promised to pay him twenty-five dollars for his services, to which the plaintiff assented and forbore all further proceedings; it was held, that the plaintiff's forbearance was a good consideration for the defendant's promise, and that the same was not a promise to pay the debt of another within the statute of frauds. *Call* v. *Calef*, 388.

6. A stipulation in an agreement for a conveyance of land, that the grantee, in addition to paying the purchase money, shall first clear the land of stones, "at the rate of at least three acres by the year until the whole lot is cleared," "and shall haul the stones into heaps or near the road in places easy of access," to be taken away by the grantor, does not require that the three acres annually cleared shall be cleared in one parcel, but is performed if several parcels or lots are cleared each year, which, taken together, amount to three acres. *Farwell* v. *Rogers*, 460.

See Assumpsit, 2, 3; Evidence, 2; Executor, &c.; Frauds, Statute of, 2; Promissory Note, 1; Time

CONTRIBUTION.

See Mortgage, 3.

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CORPORATION.

A vote by the proprietors of a bridge, that "All the present proprietors of stock therein shall have the right to pass free of toll, with their horses and carriages," is confined to persons, who are then proprietors of the bridge, and does not extend to those who subsequently become the purchasers of stock then existing. *Central Bridge* v. *Abbott*, 473.

See BANK; TRUSTEE PROCESS, 1; TURNPIKE CORPORATION.

COSTS.

1. The plaintiff, in an action on a covenant implied in a lease for years, for the quiet enjoyment of the premises without interruption by the lessor, if he recover a sum in damages not exceeding twenty dollars, is entitled to no more costs than one quarter part of the sum recovered in damages, unless the title to real estate is concerned in such action. *Dexter* v. *Manley*, 14.

2. The declaration, in an action of assumpsit, contained two counts, the first on an account annexed for goods sold and delivered, &c., the principal item of which was a charge for twelve and a quarter tons of hay, and the second a special count alleging a sale by the plaintiff, and a purchase by the defendant, of thirty tons of hay then in the plaintiff's barn, and to be taken therefrom by the defendant, and a refusal by the defendant to accept or pay for the same. On the trial, it appeared that the hay was sold and delivered, and that the defendant took and carried away a part of the same, namely, the quantity mentioned in the first count, and refused to accept and pay for the residue. The judge, being of opinion that the contract was entire, and that the evidence proved a sale and delivery of the whole quantity of hay, instructed the jury accordingly, who rendered a verdict on the first count for the plaintiff, and on the second for the defendant. It was held, that the two counts were not for several and distinct causes of action within the Rev. Sts. c. 121, § 16, and, consequently, that the defendant was not entitled to costs for his witnesses on the second count, on which the verdict was in his favor. *Totman* v. *Carpenter*, 148.

3. Where the estimate of a petitioner's damages, occasioned by the construction of a railroad, as made by the county commissioners, is revised by a jury, on the application of the petitioner, and the amount reduced, and the verdict of the jury is accepted by the court of common pleas, neither party is entitled to recover the costs of the hearing before the jury. If, in such case, the court of common pleas award judgment for costs to the petitioner, and the respondents appeal therefrom to this court, the respondents will be entitled, on the reversal of the judgment of the court of common pleas, as to costs, to recover the costs of the appeal, and also their costs in this court. *Gray* v. *Lowell & Lawrence Railroad*, 609.

See ARBITRAMENT, &c., 7, 8; EXCEPTIONS, 7; TRUSTEE PROCESS, 10.

COURT OF COMMON PLEAS.

See BURDEN OF PROOF, 2; SPECIFICATION OF DEFENCE.

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COURTS OF THE UNITED STATES.

See JUDGMENT; JURISDICTION.

COVENANT.

It is a breach of the covenant of seizin, if there is no such land in existence, as the deed purports to convey. *Bacon* v. *Lincoln*, 210.

See COSTS, 1; LANDLORD AND TENANT, 3; LEASE, 1, 2, 3; PLEADING, 4, 5, 6; WITNESS, 3.

DAMAGES.

1. If exemplary, vindictive or punitive damages are ever recoverable, in any case, they cannot be recovered in an action for an injury which is also punishable by indictment. *Austin* v. *Wilson*, 273.
2. In an action to recover the price of goods sold, the buyer may show, in reduction of damages, that the goods were not of the quantity or quality alleged. *Westcott* v. *Nims*, 215.
3. Special damage is that which may be given in evidence to aggravate the damages sued for in an action already pending, or which may be itself a distinct cause of action. *Smith* v. *Sherman*, 408.
4. Loss of time, and expenses incurred, in preparations for marriage, are grounds of damage, directly incidental to the breach of a promise of marriage, but not of special damage. *Ib.*
5. By fire from locomotive engines. See RAILROAD CORPORATION, 1.
6. For land taken by highways or railroads. See RAILROAD DAMAGES.

See ACTION, 2; BLACKSTONE CANAL; HUSBAND AND WIFE, 2; LANDLORD AND TENANT, 7; LEASE, 2, 3; MALICIOUS PROSECUTION, 8, 9 TOWN; TROVER, 2.

DEATH.

See AMENDMENT, 2.

DEBT.

See MILL, 1.

DECLARATION.

See PLEADING, II.; WRIT.

DEDICATION.

See WAY, 1, 2.

DEED.

1. A deed of real estate, though not acknowledged, is good against the grantor, his heirs and devisees. *Call* v. *Buttrick*, 345.
2. Where the acknowledgment of a deed is taken and certified by a notary public, his certificate need not be authenticated by his notarial seal. *Farnum* v. *Buffum*, 260.
3. The possession of an instrument, signed and sealed, in the hands of the

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party to whom it purports to be made, is *prima facie* and not conclusive evidence of delivery. *Chandler* v. *Temple*, 285.

4. Where it appeared in evidence, in an action of debt, that the two parts of an indenture declared on were executed by the parties of the one part, and by some of the parties of the other part, with an agreement, that one of the latter, who had executed the instrument, should obtain the signatures of his co-obligors to one part, to be then exchanged for the other part, which such party was in like manner to get signed; and one part of the instrument was executed accordingly, but was never exchanged for the other, the execution of which was therefore not completed; it was held, that there was no sufficient legal delivery of the instrument, to make it the deed of the obligors named therein. *Ib.*

5. A trustee of land cannot transfer his legal estate by a deed purporting only to convey all the right, title and interest of the *cestui que trust* therein. *Titcomb* v. *Currier*, 591.

6. Where a grantor conveyed "one undivided half of all the buildings that are situated on the homestead I now improve and occupy with the land under and about the same;" and on the same day, the grantee made a lease in writing, not sealed, to the grantor of "one half of all the buildings and land under and adjoining the same, situated in R., it being the homestead of the said grantor;" it was held, that the lease might be considered in construing the deed, and that by the deed an undivided half of the entire parcel upon which the buildings stood, with the land immediately adjacent, all together constituting the homestead of the grantor, passed. *Cloyes* v. *Sweetser*, 403.

7. Where land is conveyed "beginning at" and "bounding on land of B.," the point of beginning and boundary is the true line of B.'s land, and not the line of B.'s occupation as shown by a fence set up and maintained by B. before and after the conveyance, with the consent of the owner of the lot conveyed, under the mistaken belief that such was the true line. *Cleaveland* v. *Flagg*, 76.

8. Where the grantor in a deed reserves to himself the privilege of entering the land conveyed, and of taking and carrying away stone therefrom; this is not a reservation of a mere personal privilege to the grantor, but of a right and interest in the use of the land, which the grantor may assign. *Munn* v. *Stone*, 146.

See CONDITION; CONTRACT, 2; PLEADING, 3.

DELIVERY OF DEED.

See ASSIGNMENT, 1; DEED, 3, 4.

DEMAND.

A demand of a greater sum than is due is, in general, a good demand of what is due; it is otherwise, where non-payment of what is due will give rise to a forfeiture. *Shirley* v. *Shattuck*, 470.

See ATTACHMENT, 5.

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DEMURRER.

See PLEADING, 7.

DEVISE.

See WILL.

DISCHARGE IN BANKRUPTCY.

See BANKRUPTCY; PRACTICE.

DISCHARGE IN INSOLVENCY.

See INSOLVENCY PROCEEDINGS, 15, 16.

DISSEIZIN.

Land being conveyed and described as bounding on the land of an adjoining owner, of a part of which the grantor was in fact disseized, such adjoining owner being then in the occupation of that part, under a mistaken belief of both that the line of occupation was the true line, the grantee entered and removed the fence from the supposed to the true line, and remained in possession accordingly; it was held, that the grantee, by way of rebutter and to avoid circuity of action, might avail himself of his title in defence to a writ of entry brought by the adjoining owner. *Cleaveland* v. *Flagg*, 76.

See TENANTS IN COMMON.

DIVORCE.

See LASCIVIOUS COHABITATION; MARRIAGE, 1.

DOMICIL.

Whether a person removing from one town to another intends to change his residence, is a question of fact, and not of law. *Fitchburg* v. *Winchendon*, 190.

DONATIO CAUSA MORTIS.

See GIFT.

DOORS.

See EXECUTION, 3.

DOWER.

1. A widow is not entitled to dower in lands, conveyed away by her husband before marriage, although such conveyance was fraudulent and void as against his creditors. *Whithed* v. *Mallory*, 138.
2. Where a mortgagor dies in possession of the mortgaged premises, he is sufficiently seized thereof at the time of his death, to entitle his widow to an assignment of dower therein, upon a petition to the probate court, under the Rev. Sts. c. 60, § 3. *Henry's Case*, 257.
3. The widow of a mortgagor of real estate, who has released her dower therein, is nevertheless entitled to have dower assigned to her in the mort

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gaged premises, (the mortgage debt still subsisting), upon a petition to the court of probate therefor, under the provisions of the Rev. Sts. c. 60, §§ 2, 3; provided the mortgagor died seized, and neither the mortgagee nor the heirs or devisees of the mortgagor object to such assignment. *Ib.*

4. If a widow, for whom provision is made in the will of her husband, do not make her election, agreeably to the Rev. Sts. c. 60, § 11, to take such provision, or be endowed of his lands; such omission will be considered as conclusive evidence of her acceptance of the provision made in the will, and a waiver of her right of dower. *Pratt* v. *Felton*, 174.
5. Where a widow, to whom real estate was devised by her husband, made a demand of dower in his estate, and, afterwards, being in possession of the estate devised to her, leased the same to a tenant, who entered and took possession of and occupied the same; it was held, that whether the terms of the statute would be complied with or not by an implied election the facts stated were no evidence of the election required by the statute. *Ib*

ELECTION.

See DOWER, 4, 5.

EMBEZZLEMENT.

1. Of estates of persons deceased. See PROBATE COURT, 2; PLEADING, 8
2. Of estates of insolvent debtors. See INSOLVENCY PROCEEDINGS, 12, 13, 14.

EMINENT DOMAIN.

1. Where the land of an individual is taken, under the authority of the legislature, for a public use, and a full compensation is paid to the proprietor for a perpetual easement therein; and the same land is afterwards appropriated, by legislative authority, to another public use of a like kind; the owner of the land is not entitled to any further compensation. *Chase* v. *Sutton Manufacturing Company*, 152.
2. An act of the legislature, by which certain persons were incorporated as an aqueduct company, for the purpose of supplying a village with pure water, with authority to take springs, lands and rights, and subject to the payment of damages therefor as provided by law in the case of land taken for highways, is not unconstitutional, on the alleged ground, that it authorizes the taking of private rights of property for a use which is not public; although it contains no express provision requiring the corporation to supply, on reasonable terms, all persons applying for water. *Lumbard* v *Stearns*, 60.

See BLACKSTONE CANAL; RAILROAD, 1.

EQUITY.

1. This court has jurisdiction in equity, to enforce the specific performance of a contract for the purchase of land, which the intended purchaser refuses to complete, on the ground, that a third person has a lien upon the estate, under a building contract with a former owner. *Hilliard* v. *Allen*, 532.

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2. Where a railroad corporation, under a general grant of power, lay out and construct their road over and along a public highway, the town, within which such highway is situated, may proceed in equity against the corporation in this court, under its general jurisdiction in matters of nuisance, in order to ascertain whether such laying out and construction is or is not within the power granted to the corporation; and it is immaterial, in this respect, whether the way in question be a highway, properly so called, or a town way. *Springfield* v. *Connecticut River Railroad*, 63.

3. This court, as a court of chancery, has no jurisdiction, where the ground of the application is the alleged fraud or improper conduct of an executor, in the execution of his trust as such, in reference to a matter properly embraced in and settled by his account as executor in the probate court; even though such account was settled without notice to the parties interested. *Sever* v. *Russell*, 513.

4. Equity jurisdiction of this court in matters of insolvency. See INSOLVENCY PROCEEDINGS, 6, 7, 12; *Agawam Bank* v. *Morris*, 99; *Thompson* v. *Snow*, 121.

ERROR.

Where, in an action of trespass against three defendants, in which the defendants pleaded the general issue, one of them severally and the others jointly, the jury returned a verdict that "the defendant is guilty," and judgment was rendered thereon against the defendant who pleaded severally, without taking any notice of the others; it was held, that the defendant against whom the judgment was rendered was alone entitled to reverse the same by error, and that a writ of error in favor of the three was improvidently issued, and must be quashed. *Shaw* v. *Blair*, 97.

See PLEADING, 7.

ESTOPPEL.

The mayor of a city, who, under the authority of an order of the board of aldermen, which they had no power to pass, has granted a license for the moving of a building through the streets, is not estopped, in an action of trespass against him, for removing the building out of the street, where it has been left by the owner in the course of such removal, to set up the invalidity of the license. *Day* v. *Green*, 433.

See LANDLORD AND TENANT, 1.

EVIDENCE.

1. The declarations or admissions of an agent, accompanying acts done by him within the scope of his authority, and during the period of his agency, are admissible in evidence against his principal, as a part of such acts, but not otherwise. *Cooley* v. *Norton*, 93.

2. The date of a contract in writing, when referred to in the body of the contract, as fixing the time of payment, cannot be altered or varied by parol evidence. *Joseph* v. *Bigelow*, 82.

3. The testimony of arbitrators is not admissible to impeach their award. *Bigelow* v. *Maynard*, 317.

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4. The terms of an award in writing cannot be controlled by the oral declarations of the arbitrators, though made to the parties at the time of its publication. *Clark* v. *Burt*, 396.

5. The admissions of one of the parties to an award, as to the meaning and intention of the arbitrators, are inadmissible in evidence to control its terms. *Ib.*

6. Where there is no record of the establishment of school districts in a town, parol evidence is admissible, to show that the inhabitants of such town, living within certain specified limits, have been known and recognized, and have acted, in all respects, as a school district, for many years; and from such evidence, a jury may infer that such district had a legal origin and was legally established, provided the whole town was, in like manner, laid out into districts by territorial or geographical divisions. *Bassett* v. *Porter*, 487.

7. An ancient book, kept among the records of a town, purporting to be the "selectmen's book of accounts with the treasury of the town," is admissible in evidence of the facts therein stated; and, where the selectmen were at the same time assessors, an entry, in such book, of a credit, by an order in favor of the collector for a discount of a particular individual's taxes, was held to be evidence of an abatement of the tax of such individual. *Boston* v. *Weymouth*, 538.

8. On an issue, submitted to a jury, whether an instrument, purporting to be the last will and testament of one deceased, was procured to be made by the undue and unlawful influence of the residuary legatee therein named, evidence having been introduced to prove the affirmative of the issue, it was held, that evidence was admissible, on the other side, that a large part of the property of the testatrix was derived by her by inheritance from her minor son, who died many years previous, and who was greatly attached to the residuary legatee, and had frequently expressed his intention, if he should attain the age of twenty-one years, to leave the bulk of his property to him, and that this intention was known to the testatrix. *Glover* v. *Hayden*, 580.

9. On the question of fraud in a conveyance of personal property, evidence that the vendee afterwards conveyed a portion of it, with other property, to a creditor of the vendor, as security for the debt, the vendee being also liable therefor as surety, is inadmissible to rebut the evidence of fraud *Kimball* v. *Thompson*, 441.

10. In an action against an officer for attaching goods exempt from attachment by law, evidence that the owner had included them in a mortgage, made without consideration, and with the intention of putting his property out of the reach of creditors, is immaterial. *Bean* v. *Hubbard*, 85.

11. A witness having been asked whether he was not biassed against the defendant, from the defendant's having testified against him in another suit to which the witness was a party, and whether he had not made use of threats of injury against him in that suit, and having denied any such bias or threats, it was held, that evidence that the witness had offered to bribe the defendant not to testify in that suit was irrelevant and inadmissible. *Cooley* v. *Norton*, 93.

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12. Evidence having been introduced tending to prove a conspiracy between the defendant and one K., to hire a witness to commit perjury on the trial; and that K., who was an inhabitant of another state, had been requested to attend the court as a witness, but was not present; it was held, that the defendant could not, on the cross examination of a witness who had testified that he was a near neighbor of K., and had seen him every day during the week of the trial, inquire whether K. was a member of a church in the place where he lived. *Bates* v. *Barber*, 107.

See Burden of Proof; Contract, 1, 2; Deed, 3, 6; Lease, 2; Malicious Prosecution, 2, 3, 4, 5, 7, 8, 9; Mill, 2; Mortgage, 4; Pauper, 5, 6; Promissory Note, 4; Railroad Damages, 3; Witness.

EXCEPTIONS.

1. Where evidence is rightly rejected, though for an insufficient reason, no exception lies. *Bean* v. *Hubbard*, 85.

2. Where it does not appear, that a witness rejected as incompetent knew or could testify to any thing relevant to the issue on trial, such rejection is not a valid ground of exception. *Bates* v. *Barber*, 107.

3. It is not erroneous in a judge, in the trial of a cause, to refuse to rule, at the request of the defendant, that upon the evidence introduced by the plaintiff, the defendant is entitled to a verdict. *Bassett* v. *Porter*, 487.

4. The comments of a judge upon evidence are not matter of exception. *Mansfield* v. *Corbin*, 213.

5. The rulings of a judge, in the trial of a case, limiting the course of inquiry on cross examination, and excluding inquiries in respect to topics irrelevant to the matter in issue, are not subject to exception. *Commonwealth* v. *Shaw*, 593.

6. When a case is brought into this court from the court of common pleas, by a bill of exceptions, no objection can be taken in this court which was not made in the court below. *Wentworth* v. *Leonard*, 415.

7. Exceptions adjudged frivolous, and double costs allowed against the party excepting. *Mansfield* v. *Corbin*, 213.

See Nonsuit; Specification of Defence.

EXECUTION.

1. The articles exempted from execution by the Rev. Sts. *c.* 97, § 22, *cl.* 2, as "other household furniture necessary for the debtor and his family, not exceeding $50 in value," are not merely things so absolutely indispensable, that the debtor cannot live without them, but things so essential as to be regarded among the necessaries rather than the luxuries of life. It was held, accordingly, that a sofa and two carpets, of a plain and cheap character, which, together with the other household furniture of the debtor, were of less value than $50, were exempted from execution under this clause. *Davlin* v. *Stone*, 359.

2. It is the duty of an officer, in the execution of a writ of *habere facias possessionem*, to deliver actual and quiet possession of the premises to the party in whose favor the writ is issued; and, for this purpose, to remove

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from the possession, (using no more force than is necessary,) all persons therein, especially if they claim under the party against whom the judgment is rendered. *Howe* v. *Butterfield*, 302.

3. An officer, in the execution of a writ of *habere facias possessionem* of a house, may enter the same by breaking a door which is fastened, without making a previous demand of admission, although there are persons then in the house; provided they are there for the purpose of holding possession by force, and of opposing the officer in the execution of his precept, and it does not appear, that he knew, or had any cause to suppose, that any person was in the house. *Ib.*

4. Where an officer, in the execution of a writ of *habere facias possessionem* of an undivided part of a house, entered into the same, and, by the direction of the owners of the other parts, who were also the assignees of the judgment upon which the writ issued, forcibly removed from the house a person entering without right after the entry of the officer; it was held, that the officer was justified, both by the order of such owners, and by the authority of his writ. *Ib.*

5. The purchaser of goods at a sale on execution acquires a valid title thereby, provided it appears by the return that the sale was conducted according to law, although the judgment and previous proceedings are irregular. *Park* v. *Darling*, 197.

6. The owner of land before his marriage made a conveyance thereof which was fraudulent and void as against creditors: The grantee conveyed the same to a third person for the consideration of love and affection, after which the grantor married: A creditor of the grantor subsequently levied his execution on the land so conveyed, and the appraisers made a deduction from the value thereof, on account of the possible right of dower therein of the wife of the judgment debtor: In a writ of entry by the creditor against the second grantee to recover the land levied on, it was held, that the wife had no right of dower therein, and that the tenant might avoid the levy, on the ground, that by reason of such deduction a greater amount of land had been taken on the execution than the demandant had a right to take. *Whithed* v. *Mallory*, 138.

7. The words "within sixty days," in the direction to return an execution issued by a justice of the peace, mean the same as "in sixty days," or "at the end of sixty days." *Adams* v. *Cummiskey*, 420.

See INSOLVENCY PROCEEDINGS, 2; TRUSTEE PROCESS, 9.

EXECUTOR AND ADMINISTRATOR.

An agreement, by an administrator or guardian, to offer the real estate of his intestate or ward for sale by auction, and to sell the same to a particular individual, for an agreed price, provided no higher sum should be bid, is valid. But such an agreement to sell the estate at a fixed price, without regard to the biddings, is fraudulent and void. *Hunt* v. *Frost*, 54.

See ACTION, 5; APPEAL; EQUITY, 3; RAILROAD DAMAGES, 4; TRUSTEE; TAX, 2.

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FIRE.

See RAILROAD CORPORATION, 1.

FLOWING LAND.

See MILL.

FORCIBLE ENTRY AND DETAINER.

1. In this commonwealth, as well as in England, the remedy for a forcible entry unlawfully made is twofold, by indictment at common law, and by proceedings under the several statutes relating to forcible entry and detainer. *Commonwealth* v. *Shattuck*, 141.
2. In order to maintain an indictment for a forcible entry, the entry must be accompanied by circumstances tending to excite terror in the occupant, and to prevent him from maintaining his right; such as apparent violence, unusual weapons or attendance, menaces, or other acts which give reasonable cause to fear, that the party entering will do some bodily hurt to the occupant, if he do not give up the possession. *Ib.*

See INDICTMENT, 6.

FORFEITURE.

See CONDITION.

FRANCHISE.

See RAILROAD, 1; AQUEDUCT CORPORATION.

FRAUD.

See FRAUDULENT CONVEYANCE; EQUITY, 3; PROBATE COURT, 1; PROMISSORY NOTE, 4.

FRAUDS, STATUTE OF.

1. A parol agreement, between the parties to a lease for years in writing, entered into before the expiration of the lease, that the lessee would take the premises for another year, on the same terms, is within the statute of frauds (Rev. Sts. c. 74, § 1), as an agreement not to be performed within a year, and no action can be maintained thereon. *Delano* v. *Montague*, 42.
2. An agreement for the delivery of a quantity of planks for ship-building, at a future time, and at a specified price, is a contract for the sale of goods, within the statute of frauds. *Waterman* v. *Meigs*, 497.
3. A letter from the purchaser to the vendor, alluding to a parol agreement for the sale of goods, and inquiring whether they will be ready at the time agreed upon, but not mentioning the quantity, quality, or price of the goods, or the time of payment, is not a sufficient memorandum to take the agreement out of the statute of frauds. *Ib.*

See CONTRACT, 5.

FRAUDULENT CONVEYANCE.

A conveyance of personal property, by a debtor in embarrassed circum-

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stances, for the purpose (known to the purchaser) of securing the same from attachment, is void as against creditors, although the debtor, at the time, believes that such conveyance is for the benefit of his creditors, and may intend that his creditors shall ultimately be paid. *Kimball* v. *Thompson*, 441.

See BANKRUPT LAW, 2; DOWER, 1; EVIDENCE, 9, 10; INSOLVENCY PROCEEDINGS, 12, 13, 14; LIMITATIONS, 2; REPLEVIN, 2.

FURNITURE.

Exempt by law from attachment and execution. See EXECUTION, 1.

GIFT.

1. A chose in action, as the promissory note of a third person, or a security for money, may be the subject of a gift *mortis causa*. *Sessions* v. *Moseley*, 87.

2. Where one, in apprehension of death, delivers a thing to another, to be given by him to a third, after the death of the donor, and, on such donor's death, the thing is delivered accordingly to the donee designated, and accepted by him, this is a valid gift *mortis causa*: But where one, not in apprehension of death, delivers a thing to another, to be given to a third, when the depositary shall see him, whether the donor live or die, the authority of the depositary to deliver the thing will be revoked by the death of the donor, unless it be previously delivered to the donee and accepted by him. *Ib.*

GUARDIAN AND WARD.

The guardian of a minor, on the coming of age of his ward, having settled an account with him, and taken his receipt in full for the balance due as guardian, and being afterwards summoned into the court of probate, upon the petition of the ward, to settle his guardianship account; it was held, that notwithstanding such settlement and receipt, the guardian was bound to answer on oath proper interrogatories respecting his account and the items thereof, and that the ward might introduce evidence touching the execution and validity of the receipt. *Wade* v. *Lobdell*, 510.

See EXECUTOR AND ADMINISTRATOR.

HEIR.

See LANDLORD AND TENANT, 2; RAILROAD DAMAGES, 4.

HIGHWAY.

See WAY.

HUSBAND AND WIFE.

1. The act of 1842, c. 74, does not enable a married woman to make a devise of her real estate to her husband. WILDE and DEWEY, Justices, dissenting. *Morse* v. *Thompson*, 562. [But see *St.* 1850, c. 200.]

2. Where an action is brought against husband and wife for a libel by the wife, no smaller damages are to be assessed, than would be legally recov

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erable if the libel had been published by her while sole, and the action had been against her alone. *Austin* v. *Wilson*, 273.

See ACTION, 2.

INDICTMENT.

1. Two or more persons may be jointly charged, in the same indictment, with the offence of selling spiritous liquors without license. *Commonwealth* v. *Sloan*, 52.
2. An allegation, in an indictment against two, for selling spiritous liquors without license, and in contravention of the Rev. Sts. c. 47, that the defendants "did presume to be a retailer of wine, brandy, rum and other spiritous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, without being first licensed as a retailer of wine and spirits, according to law," is a sufficient averment that the defendants were neither jointly nor severally licensed, and will support a verdict of guilty against one alone. *Ib.*
3. In an indictment on the Rev. Sts. c. 58, § 2, by which the setting up or promoting of any of the exhibitions therein mentioned, without license therefor, is prohibited, it is not duplicity to allege that the defendant "did set up *and* promote" such an exhibition. *Commonwealth* v. *Twitchell*, 74.
4. If it is alleged, in an indictment on the Rev. Sts. c. 58, § 2, which imposes a penalty on any person, who shall set up or promote any exhibition to which admission is obtained by the payment of money, without a license first obtained, that the defendant did set up and promote such an exhibition (describing it) without being first duly licensed therefor, and contrary to the form of the statute, this is a sufficient allegation that the exhibition was unlawful, and was unlawfully set up and promoted. *Ib.*
5. In an indictment for setting up and promoting an exhibition prohibited by statute, it is a sufficient description of such exhibition, to allege that it "purported" to be an exhibition of certain performances. *Ib.*
6. In an indictment for a forcible entry, it is a sufficient charge of the offence, to allege the entry to have been made unlawfully, with force and arms, and with a strong hand. *Commonwealth* v. *Shattuck*, 141.

See COMPLAINT; FORCIBLE ENTRY, &c.; MALICIOUS PROSECUTION, 5.

INFANT.

See PARENT AND CHILD.

INNKEEPER.

The keeper of a public house in the neighborhood of a railroad station, having given public notice that he would furnish a free conveyance, to and from the cars, to all passengers, with their baggage, travelling thereby, who should come to his house as guests, and for this purpose, having employed the proprietors of certain carriages to take all such passengers free of charge to them, and to convey them and their baggage to his house; if a traveller by the cars, to whom this arrangement is known, employ one of the carriages thus provided to take him and his baggage to such public

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house, and his baggage is lost or stolen on the way, through a want of due care or skill on the part of the proprietor of the carriage or his driver, the keeper of the house will be liable therefor in assumpsit or case. *Dickinson* v. *Winchester*, 114.

INSOLVENT DEBTORS.

The term "insolvency," as used in the insolvent laws, does not mean an absolute inability of the debtor to pay his debts, at some future time, upon a settlement and winding up of all his affairs, but a present inability to pay in the ordinary course of business. *Thompson* v. *Thompson*, 127.

See INSOLVENCY PROCEEDINGS; LIMITATIONS, 2; REPLEVIN, 4.

INSOLVENCY PROCEEDINGS.

1. An attachment of the property of a partnership, by the trustee process, is not dissolved by the subsequent several insolvency of one of the partners, after a dissolution of the partnership. *Fern* v. *Cushing*, 357.
2. An attachment of personal property, which is sold on the writ, pursuant to the provisions of the Rev. Sts. c. 90, §§ 57, 61, is dissolved by the insolvency of the debtor, in the same manner as if the property remained unsold, whether the creditor or the officer have knowledge of the insolvency or not; provided the first publication of notice of the insolvency takes place before the proceeds of the sale are seized on the execution; and if the officer, without notice of the debtor's insolvency, pay over such proceeds to the judgment creditor, after the first publication of notice of the insolvency, he may recover back the same of the creditor. *Edwards* v. *Sumner*, 393.
3. In all cases of proceedings in insolvency instituted *in invitum*, St. 1844, c. 178, § 9, requires that notice should be given to the debtor before the warrant is issued, and without such notice the proceedings are void. *Thompson* v. *Snow*, 121.
4. Where a warrant in insolvency is issued against partners, on the petition of a creditor, without previous notice to them, a formal waiver of notice, filed by one of the partners with the commissioner, does not make the proceedings good as against his copartner. *Ib.*
5. One partner, after a dissolution of the partnership, may commence proceedings in insolvency, under St. 1838, c. 163, § 21, by his sole petition, so as not only to affect his own property and the property of the firm, but also the separate property of his late partners. *Thompson* v. *Thompson*, 127.
6. Before the issuing of a warrant in insolvency against a partnership, on the petition of one partner, notice to the other partners, though not prescribed by law, may be required by the commissioner, in his discretion; and any partner not so notified may apply to this court, under St. 1838, c. 163, § 18, to suspend and vacate the proceedings, on showing that the partnership is not insolvent, and that there was no foundation for the allegation of insolvency, on which the proceedings were instituted. *Ib.*
7. Where proceedings in insolvency, instituted against a partnership, on the

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petition of one partner, without previous notice to his copartners, are suspended by this court, on the application of a partner not so notified, the case will be referred to a master to inquire and report as to the truth of the statements upon which the proceedings were commenced, before making a final decision. *Ib.*

8. Two partners having given a promissory note on partnership account, signed with their individual names, to a person to whom the existence of the partnership was known, who indorsed and transferred the note, without informing the indorsee of the partnership, one of the partners afterwards went into insolvency, but without any property of the firm being assigned to his assignee; it was held, upon proof of the partnership, that the note was a partnership note, provable as such against the insolvent, by the indorsee, who would be entitled to a dividend thereon out of any surplus remaining after paying the separate debts of the insolvent. *Agawam Bank* v. *Morris*, 99.

9. A partnership note having been indorsed by the payee to a third person, and by him indorsed to and discounted at a bank of which he was president, and one of the promisors having afterwards become insolvent, the bank proved the note as a claim against his estate: The solvent promisor, afterwards, at the urgent request of the second indorser, and for the purpose of securing him and the bank, but without the knowledge of the bank, gave him security applicable to the note in question, and also to another note held by the bank, such indorser promising to account to the promisor for the surplus of the security, if any: It was held, that the security was not given to the bank, but was a personal one to the second indorsee, and to indemnify him as such; and that a subsequent order of the commissioner, on the motion of the assignee, directing the note to be struck out of the list of claims proved, and disallowing the same, on the ground, that the bank held collateral security therefor, which had not been surrendered or applied, was erroneous. *Ib.*

10. If a claim against the estate of an insolvent debtor be contested by the assignee, on the ground of a discharge therefrom by previous proceedings in insolvency against such debtor, the validity of the certificate may be impeached by the creditor, and tried and decided by the commissioner. *Gates* v. *Mack*, 48.

11. The appeal, authorized by the *St.* of 1838, c. 163, § 4, from the decree of the commissioner of insolvency, rejecting or allowing the claim of a supposed creditor, must be entered "in the proper court which shall be first held within and for the county in which the proceedings are had, next after the expiration of fourteen days from the time of claiming the appeal;" and if omitted to be so entered, through forgetfulness or mistake, cannot be entered at a succeeding term. *Palmer* v. *Dayton*, 270.

12. This court has jurisdiction, under the general supervisory power conferred upon it in matters of insolvency by *St.* 1838, c. 163, § 18, to revise the proceedings of a judge of probate, master in chancery, or commissioner in insolvency, under the *St.* 1846, c. 168, § 1, against persons charged with fraudulently embezzling, or disposing of any of the estate of an insolvent debtor. *Harlow* v. *Tufts*, 448.

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13. The purpose of *St.* 1846, *c.* 168, § 1, authorizing proceedings against any person suspected of having fraudulently received, &c., any of the estate of an insolvent debtor, is intended not only to provide for the investigation of cases of actual fraud, in which the property of an insolvent is obtained without consideration, but also to enable creditors or those interested to discover and pursue property, which is so withdrawn from the assets of the insolvent, that it cannot be applied in satisfaction of his general creditors. *Ib.*

14. The provisions of *St.* 1846, *c.* 168, § 1, authorizing proceedings "against any one suspected of having fraudulently received, concealed, embezzled, or conveyed away any of the money, goods, effects, or other estate" of an insolvent debtor, extend to fraudulent conveyances of real estate. *Ib.*

15. A discharge in insolvency, granted at a third meeting of creditors, called after the expiration of six months from the appointment of assignees, is void. *Williams* v. *Robinson*, 529.

16. The provision of the statute of 1844, *c.* 178, § 4, that, to prevent the discharge of an insolvent debtor, whose assets pay less than fifty per cent of the claims proved against his estate, the dissent of a majority in value of his creditors, who shall have proved their claims, shall be signified within six months after the date of the assignment, is a condition precedent, to be strictly construed in favor of the debtor; and where a creditor proved his claim and filed his dissent, after the expiration of the six months, but at an adjournment of a meeting called and held within the six months, it was held, that the condition was not complied with, notwithstanding the provision of the statute of 1838, *c.* 163, § 16, that all things lawfully done at any adjourned meeting shall be of the like force and effect as if done at the original meeting. *Revere* v. *Newell*, 584. And see *Williams* v. *Robinson*, 529.

INSURANCE.

See MORTGAGE, 2.

JOINT TENANTS.

See TENANTS IN COMMON.

JUDGE.

See BANKRUPT LAW, 1; EXCEPTIONS, 4; WITNESS, 7, 8.

JUDGE OF PROBATE.

See PROBATE COURT.

JUDGMENT.

1. The tenant in a real action, brought to recover land levied on in execution of a judgment of the circuit court of the United States, in favor of the demandant against a third person, to which judgment such tenant is not a party or privy, is not concluded thereby from showing by proof that the judgment is erroneous and void for want of jurisdiction of the parties *Vose* v. *Morton*, 27.

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2. Where an action is brought in the circuit court of the United States, in the name of the indorsee or holder of a promissory note payable to order, or of the bearer of a note transferable by delivery, and judgment is rendered therein by default; it is competent for one, not a party or privy to such judgment, against whom it is sought to be enforced, to impeach the same by showing that the note was not actually negotiated to the nominal plaintiff, before the commencement of the action. *Ib.*

See Error; Malicious Prosecution, 2, 3; Trover, 2.

JURISDICTION.

If a suit is commenced in the circuit court of the United States, in the name of a citizen of another state, under a general authority or permission or otherwise, upon a cause of action in which the nominal plaintiff has no interest legal or equitable, the court has no jurisdiction of the parties; and if such suit is brought without the nominal plaintiff's authority or direction, but is afterwards ratified or sanctioned by him; or if after the bringing of the suit, a more formal transfer of the cause of action is made to the plaintiff, and accepted by him; such ratification or transfer will not give the court jurisdiction. *Vose* v. *Morton*, 27.

See Judgment; Railroad, 2; Probate Court, 2.

JURY.

See Sheriff's Jury; Way, 6; Witness, 8.

JUSTICE OF THE PEACE.

1. The proper time for the entry of an action before a justice of the peace is within the hour named in the writ; and if not so entered, the defendant may refuse to appear, or may appear merely for the purpose of moving to dismiss the action. *Blanchard* v. *Walker*, 455.

2. Where a justice of the peace made an entry of a civil action upon his memorandum book, and of the proceedings therein, as follows: "1842, Dec. 3. *Daniel Darling* v. *Horace Park*. Entered and defaulted, and judgment for plaintiff for damages, 9·69, cost, 3·11 — 12·80," and issued execution accordingly; but neither the writ nor the evidence of the plaintiff's demand was then filed in the case, or in the possession of the justice; it was held, that if these papers were before the justice, when the execution was issued, the proceedings were not irregular; and that upon being subsequently produced before him and verified, he would thereupon be authorized to make a record of the judgment at large. *Park* v. *Darling*, 197.

See Execution, 7; Promissory Note, 1.

LANDLORD AND TENANT.

1. Where a judgment creditor levied his execution upon real estate of his debtor, which was then under a lease for years and in the occupation of the tenant; and before the rent became due and payable, entered upon the premises, claiming title, and threatened the tenant to put him out,

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unless he would yield possession and attorn to such creditor; whereupon the tenant agreed in writing to hold the premises under him: It was held, that such entry and disturbance, although not an eviction, in a technical sense, were equivalent to an ouster, and that the tenant was not afterwards liable to the lessor for the rent, and might dispute his title in an action of assumpsit therefor. *George* v. *Putney*, 351.

2. Where the rent in a lease for years is reserved generally, without being made payable to any particular person, and is covenanted to be paid quarterly during the term, the lease does not terminate on the death of the lessor; but the rent is payable afterwards to his heirs at law, if he dies intestate, who may maintain an action of debt on the lease to recover the same. *Jaques* v. *Gould*, 385.
3. If a lease for years, which terminates by the death of the lessor, contains a covenant, on the part of the lessee, to pay the rent reserved, and for such further time as he may hold the premises, and he holds over after the death of the lessor, he will be liable to pay the rent subsequently accruing, in the same manner as if the lease did not terminate on the lessor's death. *Ib.*
4. Where the parties to a written lease for years, before the expiration thereof, entered into an agreement, the one to let the estate, and the other to hire it, for another year, on the same terms; and, before the expiration of the lease, the lessee verbally notified the lessor, that he would not carry the agreement into effect; but the lessee, nevertheless, held over after the termination of the lease, although without intending to occupy under the agreement, or under any other agreement, and left within the year; it was held, that the lessee was not liable for the use and occupation of the premises beyond the time of his actual occupation. *Delano* v. *Montague*, 42.
5. Whether a tenant at sufferance, in this state, is liable to pay rent — *quære*. *Ib.*
6. When a lessee for years covenants to deliver up the premises, at the end of the term, to the lessor, in as good order and condition as the same then are or may be put into by the lessor; whatever repairs are necessary to keep the premises in such condition and order, must be made by the lessee. *Jaques* v. *Gould*, 385.
7. Where a town was compelled to pay damages, for an injury resulting from a defect in a highway, occasioned by the want of repair of a cellar way constructed in the sidewalk, and leading to a building adjoining thereto which was in the occupation of a tenant; it was held, that the occupant and not the owner was liable to the town for such damages. But if, in such case, there were an express agreement between the landlord and tenant, that the former should keep the premises in repair, then to avoid circuity of action, the landlord would be liable in the first instance. *Lowell* v. *Spaulding*, 277.

See BANKRUPTCY; FRAUDS, STATUTE OF, 1; LEASE.

LASCIVIOUS COHABITATION.

Where a husband obtained a divorce from the bonds of matrimony, for the

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cause of utter and wilful desertion by the wife, for the term of five years consecutively, without his consent; and the wife afterwards went into another state, and was there married to another man, with whom she returned to this state and here lived and cohabited; it was held, that if the wife was guilty of any offence under the Rev. Sts. c. 130, she was indictable under the second section for unlawful cohabitation, and not under the fourth section for lewd and lascivious behavior. *Commonwealth* v. *Hunt*, 49.

LAW AND FACT.

See DOMICIL; WAY, 6; WITNESS, 8.

LEASE.

1. In a lease for years of real estate, comprising a factory, water power, tools, machinery and apparatus, for carrying on a particular branch of manufacture, there is an implied covenant, on the part of the lessor, that the lessee shall have the free and peaceable enjoyment of the premises during the term, so as to enable him to make use thereof for the purposes for which they are intended, without any interruption or disturbance by the lessor. *Dexter* v. *Manley*, 14.

2. The lessor, in a lease for years of a building, water power and machinery, for the manufacture of pails, having reserved to himself one room in the building, together with the privilege of running a turning lathe and saw therein: In an action by the lessee against the lessor, for making use of the room and privilege reserved by him, in such a manner as to obstruct and interrupt the lessee in the use of the demised premises, it was held: (1.) That the reservation must be so construed as to enable the lessee to carry on his factory; (2.) that evidence of the mode, in which the water power reserved had been previously used, was admissible to show a reasonable limitation of the right reserved, and that it was for the jury to determine, whether the saw used by the lessor required more power than was included in the reservation; (3.) that the damages were not to be estimated by the amount of the rent, or of the lessee's profits, but according to the value of the lease; (4.) that on the question of damages, the lessee might prove the condition and capacity of his works for the manufacture of pails, the cost of making them, and their price at the shop and in the market; (5.) and that in reference to this inquiry, the testimony of a manufacturer in another place, whose works and business were similar to those of the lessee, was admissible. *Ib.*

3. The lessor for years of part of a steam mill having covenanted with the lessee, to furnish him with a certain amount of steam power during every working day in the year, and that if at any time he should fail to do so, the rent should cease during the time of such failure; it was held, that the suspension of the rent was not a liquidation of the lessee's damages for a breach of the lessor's covenant to furnish steam power. *Fisher* v. *Barrett*, 381.

4. Not under seal, admissible in evidence to construe a deed of the same

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date, between the same parties, and respecting the same subject. See DEED, 6.

See LANDLORD AND TENANT.

LEGISLATURE.

See EMINENT DOMAIN; STATUTE.

LEVY.

See EXECUTION, 6.

LIBEL.

See HUSBAND AND WIFE, 2.

LICENSE.

See POWER; SALE, 1.

LICENSE LAWS.

See SPIRITOUS LIQUOR.

LIEN.

See MECHANICS' LIEN.

LIMITATIONS, STATUTE OF.

1. The holder of a witnessed promissory note, payable to a person named therein or bearer, may maintain an action thereon, for his own use, in the name of the administrator of the payee, after the expiration of six years from the time when the cause of action accrued, provided the action is brought with the consent of such administrator. *Sigourney* v. *Severy*, 176.
2. The concealment of property by an insolvent debtor from his assignee, and the concealment from a creditor of fraudulent acts, which, if known, would enable such creditor to avoid the debtor's discharge, do not constitute a fraudulent concealment of such creditor's cause of action, within the Rev. Sts. c. 120, § 21, so as to take the case out of the operation of the statute of limitations. *Rice* v. *Burt*, 208.

See MORTGAGE, 5, 7.

LORD'S DAY.

1. By a work of "necessity," as mentioned in the exception to the prohibition of labor, business, or work, on the Lord's day, in the Rev. Sts. c. 50, § 1, is not meant a physical and absolute necessity; but any labor, business or work, which is morally fit and proper to be done on that day, under the circumstances of the particular case, is a work of necessity within the statute. *Flagg* v. *Millbury*, 243.
2. Where a defect in a highway, for an injury occasioned by which to person or property the town would be liable, is found to exist on the Lord's day,

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it is the duty of such town to cause the defect to be repaired immediately or to adopt measures to guard against the danger, until such repair can b made; and work, labor, or business, for this purpose, is a work of necessity within the statute respecting the observance of the Lord's day. *Ib.*

See ACTION, 1.

MALICIOUS PROSECUTION.

1. An action for maliciously prosecuting the plaintiff by indictment cannot be maintained, unless it be alleged in the declaration and proved, that the plaintiff has been fully acquitted of the charge in the indictment; and a discharge therefrom by the entry of a *nolle prosequi* is not sufficient; but the plaintiff is not bound to prove that he was acquitted by the jury promptly, without hesitation, delay, or deliberation. *Bacon* v. *Towne*, 217.
2. In an action for malicious prosecution, the judgment of the magistrate, by whom the plaintiff was bound over for trial, on a complaint which the magistrate had no jurisdiction to try, if admissible at all as evidence of probable cause, is *prima facie* evidence only, and not conclusive. *Ib.*
3. The judgment of the magistrate, by whom the plaintiff in an action for malicious prosecution has been bound over, to answer to a criminal charge, if relied upon as evidence of probable cause, cannot be controlled or impeached by evidence that he acted unfairly and improperly in the examination. *Ib.*
4. In an action for a malicious prosecution of the plaintiff before a magistrate, it is not incumbent upon him, in proof of want of probable cause, to give in evidence all the testimony introduced before the magistrate, in order that the court may determine whether there was or was not probable cause. *Ib.*
5. If, in an action for a malicious prosecution, in instituting proceedings before a magistrate, against the plaintiff, on a criminal charge, upon which the plaintiff was bound over and subsequently indicted, it appears that the indictment has been withdrawn by a *nolle prosequi*, on account of a formal defect therein, and that a second indictment has been returned upon the same evidence, for the same or a substantive part of the same charge, the original complaint and the proceedings thereon must be considered as the actual cause of the second indictment. *Ib.*
6. Probable cause for instituting a prosecution is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person accused is guilty. *Ib.*
7. The defendant, in an action for a malicious prosecution, may prove by the magistrate, before whom the prosecution was instituted, what the testimony before him was on the part of the government, in order to show probable cause and rebut the allegation of malice; and it is not necessary, for this purpose, that the witnesses by whom the testimony was given, or their depositions, should be produced; but, if produced, and the witnesses or deponents are unable to recollect what their testimony was, it may never-

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theless be proved by the magistrate. So, for the same purpose, the defendant may prove, that a certain person communicated to another, with a request that the latter would make it known to the defendant, the fact that the former saw the plaintiff do the criminal act of which he was accused, and that this information was communicated to the defendant, before the complaint against the plaintiff was made. *Ib.*

8. It seems, that in an action for malicious prosecution, evidence of the general bad reputation of the plaintiff is admissible, to rebut the proof of want of probable cause, and also in mitigation of damages. *Ib.*

9. Since the abolition of special pleading, the defendant in an action for malicious prosecution may give evidence of facts tending to prove the plaintiff guilty of the criminal charge imputed to him, both in proof of probable cause, and in mitigation of damages; although he is not prepared with evidence to show, that these facts were known to him at the time of the complaint against the plaintiff. *Ib.*

10. Where, in the trial of an action for the malicious prosecution of the plaintiff, on a charge of burning his own building, for the purpose of defrauding the insurers thereon, the judge instructed the jury, in reference to the question of probable cause, that the evidence tended to prove three propositions, namely: 1. An intent or motive in the plaintiff to commit the crime; 2. Guilty conduct, or acts, or knowledge of the plaintiff; 3. That the fire was the act of an incendiary; and that any two of these propositions, if proved, would constitute probable cause, but that neither alone would be sufficient: It was held, that this direction was not correct in matter of law; but that the evidence to prove the prominent facts should have been distinctly laid before the jury, with specific instructions as to what leading facts, or classes of facts, in evidence, if proved, would or would not constitute reasonable or probable cause, leaving the facts and the inferences to be drawn from them to be found by the jury. *Ib.*

MARRIAGE.

1. Whether a marriage contracted in another state by a party from whom a divorce has been granted in this commonwealth for desertion, is valid here — *quære*. *Commonwealth* v. *Hunt*, 49.

2. Breach of promise of. See ACTION, 4, 5; DAMAGES, 4.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MECHANICS' LIEN.

The lien upon real estate, created by recording a building contract under the Rev. Sts. c. 117, §§ 1, 2, cannot be preserved for a longer period than six months, without the commencement of a suit to enforce the same, by any considerations of equity, or of greater benefit to all parties, in favor of a postponement, or by means of any parol agreement, or covenant, however formal, for the same purpose. *Hilliard* v. *Allen*, 532.

See MORTGAGE, 1.

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MILL.

1. The remedy by assumpsit or debt, given by the Rev. Sts. c. 116, § 24, to enforce payment of the annual compensation or gross damages, awarded under the provisions of the same chapter, for the flowing of land for the purposes of a mill, is not cumulative, but is substituted for and takes away the common law remedy by an action of debt on the judgment. Such action can only be brought against the owner or occupant of the mill, and it must be alleged in the declaration, that the defendant is such owner or occupant. *Leland* v. *Woodbury*, 245.
2. The verdict of a sheriff's jury having restricted a mill owner from keeping up his dam and flowing the land above certain months in the year, he is liable to the land owner, in an action at common law, for flowing the land during those months; although he causes such flowing through a canal cut by him, by the side of the stream, after the verdict, instead of causing the water to flow back in the natural stream, as it flowed before the verdict: And it is no defence to such action to show, that the flowing complained of was not occasioned by the particular structure, which created the obstruction, at the time of the trial by the sheriff's jury, and which the jury had in view in giving their verdict, but a different one; that the new channel, dug by the defendant, was of greater capacity, and would carry off the water more freely and fully from the plaintiff's land, than the old channel, and was kept open during the months specified in the verdict; and, that since the verdict of the jury, the defendant had added a large amount of machinery to his mills. *Hill* v. *Sayles*, 549.

See Blackstone Canal.

MINISTER.

See Pauper, 2.

MORTGAGE.

I. *Of Real Estate.*

1. Where a mortgagee of real estate, to whom the mortgagor was also indebted under a building contract relating to the same land, which had been duly recorded, but had not been enforced by a suit thereon within six months, as required by the Rev. Sts. c. 117, §§ 1, 2, 3, entered upon the mortgaged premises for condition broken; and it was thereupon agreed between the parties, that the mortgagee should let the estate, and apply the rents to the debt under the building contract; after which and before any rent had been received or become payable, the mortgagor took advantage of the insolvent law; it was held, that the rents subsequently received by the mortgagee must be deemed to have been received by him in that capacity, and be accounted for as such. *Hilliard* v. *Allen*, 532.
2. The owner of an estate insured by a mutual fire insurance company mortgaged the estate, and, at the same time, with the assent of the insurers, transferred the policy of insurance to the mortgagee by an assignment, which was absolute in terms and expressed to be for a valuable consideration, but intended only as a security for the mortgage debt; and

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the mortgagee afterwards assigned the mortgage, and the debt thereby secured, together with the policy of insurance, by an absolute assignment, assented to by the insurers, and for a valuable consideration, paid by the assignee. The debt secured by the mortgage having been subsequently paid in full to the assignee, by an assignee of the mortgagor, and the mortgage thereupon discharged; and the assignee of the mortgagee, after the expiration of the policy, having received the return premium thereon; it was held, that although such assignee might receive the same as attorney of the mortgagor, he could not retain it against the mortgagor, to whom he was liable therefor in an action of assumpsit. *Felton* v. *Brooks*, 203.

3. Two tenants in common, having mortgaged their estate to secure the debt of one of them, assigned their respective interests in the estate to different assignees, who subsequently made partition of the same: The mortgagee brought separate actions against the assignees, to recover of each the parcel of land set to him on the partition; and the assignee of the mortgagor, for whose debt the mortgage was given, (such assignee having been notified, at the time of his purchase, that he would be bound to pay the mortgage), paid the whole amount due thereon, in discharge of the suit against him, under an agreement, that he should thereby become the owner of the mortgage: It was held, that he was not entitled to carry on the action brought by the mortgagee against the other assignee, in order to compel the latter to contribute one half of the debt. *Cook* v. *Hinsdale*, 134.

4. A certificate of the entry and possession of mortgaged premises by the mortgagee, for the purpose of foreclosure, is made evidence of such entry by the Rev. Sts. c. 107, § 2; and the effect of it cannot be avoided by proof that the mortgagee did not actually go upon the land. *Oakham* v. *Rutland*, 172.

5. If the maker of a promissory note, which has been transferred by an indorsement without date, give the indorsee a mortgage, after six and within twenty years from the time of payment of the note, to secure the payment thereof, the mortgagor cannot redeem the estate mortgaged, without paying the amount due on the note. *Balch* v. *Onion*, 559.

See Condition, 2; Dower, 2, 3; Pauper, 1; Pleading, 3; Promissory Note, 3; Sheriff's Jury, 3

II. *Of Personal Property.*

6. If goods, which have been mortgaged, and left in the possession of the mortgagor, are attached as his property, and, being receipted for, are redelivered to him, and are subsequently taken possession of, for the purpose of foreclosure, by the mortgagee, to whom the mortgagor releases his right of redemption, before judgment is rendered in the action upon which the goods are attached; these proceedings constitute no defence to an action by the officer on the receipt. *Wentworth* v. *Leonard*, 414.

7. If a note, secured by a mortgage of personal property, becomes barred by the statute of limitations, the mortgagee's title to the property is not thereby defeated. *Crain* v. *Paine*, 483.

See Assignment, 1; Attachment, 2; Pleading, 2.

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NEGLECT AND REFUSAL.

See CONDITION, 2.

NOLLE PROSEQUI.

See MALICIOUS PROSECUTION, 5.

NONSUIT.

If a judge, before whom an action is on trial, is of opinion, that the plaintiff, upon his whole evidence, is not entitled to recover, he may recommend a nonsuit on that ground; if he does so, and a nonsuit takes place, the plaintiff may allege exceptions; but if the judge is of opinion, that there is evidence to be considered by the jury, and declines to order a nonsuit, this decision is no ground for exception. *Wentworth* v. *Leonard*, 414.

See EXCEPTIONS, 3.

NOTARY PUBLIC.

See DEED, 2.

NOTICE.

See ACTION, 3; BILL OF EXCHANGE; CONDITION, 2; PAUPER, 7.

NUISANCE.

See ACTION ON THE CASE; PLEADING, 3.

OFFICER.

See BANK; EXECUTION, 2, 3, 4; TRESPASS; TROVER, 1.

ORDER.

See ACTION, 3.

OUSTER.

See LANDLORD AND TENANT, 1.

PARENT AND CHILD.

Where a father, with a view to the residence and employment of his minor son in a distant place, but without emancipating him, furnished him with various articles of clothing, and other things for his personal use, and also with a sum of money for general purposes, without any specific instructions as to the appropriation or use thereof; and the son, on the way to the place of his destination, bought other clothing with the money so furnished, without any directions from his father; it was held, that the clothing furnished to the son by the father, but not that which was purchased by the son, was the property of the father, who might maintain an action for the loss or injury thereof. *Dickinson* v. *Winchester*, 114.

PARISHES AND RELIGIOUS SOCIETIES.

1. Poll parishes and voluntary religious societies, when not restricted by

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their charters or articles of association, may make by-laws declaring what shall constitute membership, and what shall operate as a forfeiture thereof, applicable to existing as well as to future members. *Taylor* v. *Edson*, 522.

2. Where a religious society, not territorial, was incorporated, with a provision in the charter, that any person desirous of becoming a member might do so by entering his name with the wardens and vestry or clerk; and an act was subsequently passed, repealing this provision and authorizing the society to make by-laws determining the manner in which persons should thereafter become members, under which by-laws were accordingly made, in terms applicable as well to existing as future members; it was held, that a person, who was a member of the society under the provisions of their charter, ceased to be a member by failing to comply with the conditions of the by-laws. *Ib.*

3. The members of an incorporated religious society having accepted their act of incorporation, and organized under the same by the choice of a president and other officers, but never having chosen any assessors or parish committee, or adopted any by-laws directing the manner of calling meetings, five of the qualified voters of such society signed an application to a justice of the peace, requesting him to call a meeting thereof, at a specified time and place, to fill all vacancies in the offices of the society, to do all acts and things necessary to effect a full and complete organization, and to see if the society would confirm their former proceedings and amend their records, so far as might be necessary to render the same valid and effectual in law: It was held, that the society were within the provisions of the Rev. Sts, c. 20, § 17, authorizing the calling of a meeting by a justice of the peace, on the application of five or more of the qualified voters; and that the meeting called by the justice on such application was properly called and was a legal meeting, although it was not stated in the application, or recited in the warrant, that there were no assessors or parish committee. *Ladd* v. *Clements*, 476.

4. Where three out of six signers of an application to a justice of the peace to call a meeting of a religious society according to the provisions of the Rev. Sts. c. 20, § 17, were admitted to be qualified voters; a fourth, to whom it appeared by the stock book that one fourth of a share had been issued, had been clerk of the society, and one of a committee to purchase land; a fifth had become a stockholder by an original subscription in the name of a firm in which he was a partner, and by eventually succeeding to the rights of his copartners; and the sixth was a signer in the stock book, and had paid for a share, though no certificate of it could be found, and had acted as a member at former meetings; and all the signers of the application, except one of the first three, were present and acted as members at the meeting called by the justice upon this application, at which meeting ten or more other members of the society were also present. It was held, that a jury would be authorized to find that the application for such meeting was legal. *Ib.*

See AMENDMENT 1.

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PARTIES TO ACTIONS.

See PLEADING, I.

Competency of, as Witnesses.

See ARBITRAMENT, &c., 1; WITNESS, 4.

PARTNERSHIP.

See INSOLVENCY PROCEEDINGS, 1, 4, 5, 6, 7, 8.

PAUPER.

1. A mortgagor, occupying the estate mortgaged by leave of a lessee for years of the mortgagee, who has entered for condition broken, has no estate of inheritance or freehold in the premises, and cannot, by such occupation, acquire a settlement under the fourth method in the Rev. Sts. c. 45, § 1. *Oakham* v. *Rutland*, 172.

2. Where a minister, who has been regularly ordained in one town, is afterwards settled in another, as a pastor, with the full character, rights and duties of a pastor, but without any new ordination or ceremony of induction, or for a limited time, as for a year, he will, by such settlement as a minister, acquire a settlement as a pauper, within the statute of 1793, c. 34, § 2, *cl.* 7, (Rev. Sts. c. 45, § 1, *cl.* 7,) in the latter town. *Bellingham* v. *West Boylston*, 553.

3. The third section of *St.* 1811, c. 133, for dividing the town of Rehoboth, and establishing the town of Seekonk, which provided that one half of the paupers, for which the town of Rehoboth was chargeable, including such as had removed therefrom, if lawfully returned there for support, should be delivered over to the overseers of the poor of the new town, to be there supported, did not change the general law (*St.* 1793, c. 34, § 2; Rev. Sts. c. 48, § 2, *cl.* 10) relating to the settlement of the inhabitants of a town, on a division thereof, as to the settlement of the paupers referred to in such act. *Westborough* v. *Rehoboth*, 185.

4. The assessment of a tax on real estate to the occupant, and the payment of the same by him, not as of his own estate, but in right of another, are a sufficient assessment and payment of a tax, within the twelfth mode provided by statute (*St.* 1793, c. 34, § 2; Rev. Sts. c. 45, § 1) for acquiring a settlement as a pauper in the town where such party resides. *Randolph* v. *Easton*, 557.

5. In an action brought by one town against another for the support of a pauper and his family, evidence that the pauper left his former home and came to the defendant town with the intention of removing his family there as soon as practicable, that he boarded and worked there for ten years, and paid taxes there five years of the ten, and that a year after he came, his family removed there, and continued to reside with him for the rest of the ten years, when they all removed to the plaintiff town, is sufficient to warrant the jury in finding that the pauper had gained a settlement for himself and family in the defendant town. *Fitchburg* v. *Winchendon*, 190.

6. In order to prove a settlement under the twelfth mode provided by the law (*St.* 1793, c. 34, § 2; Rev. Sts. c. 45, § 1, *cl.* 12,) by a residence and the

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payment of taxes in the town where the settlement was alleged to be, an original document preserved amongst the records of the town, and purporting to be an assessment of taxes for the year 1798, was produced in evidence, from which it appeared, that taxes to the amount of $3·03 were assessed in that year, upon the individual in question, for his poll and estate; and it also appeared in evidence, that the entry of these taxes on the bill of assessment had been erased by a line drawn through it; and that the collector for the year 1798 had been allowed a credit with the treasurer of the town for a discount of the said taxes; it was held, that whether the production of the bill of assessment raised any presumption of the payment of the taxes so assessed or not, the circumstances stated above were competent evidence to prove that the taxes in question were not in fact paid. *Boston* v. *Weymouth*, 538.

7. In an action against a town, by one of the inhabitants thereof, to recover for the support of a pauper from April 5th, 1846, to April 5th, 1847, it appeared, that the pauper had been previously kept by the plaintiff, under a contract with the town, which had terminated on the 5th of April, 1846; that on the 28th of March, 1846, the overseers of the poor of the town, of whom the plaintiff was one, made an arrangement for the support of the pauper with another person, who, on the said 6th of April, accompanied by two of the overseers appointed a committee for the purpose, went to the plaintiff's house, where the pauper then was, in order to remove him to his own house; that, in consequence of some negotiation between the plaintiff and such other person, relative to the support of the pauper, but which did not terminate in a contract, the pauper was suffered to remain in the plaintiff's house, and was supported there by him; it was held, that in order to entitle the plaintiff to recover, it was necessary that he should have given the notice required by statute (Rev. Sts. c. 46, § 18), and that it was not enough that the overseers had reasonable notice, by their having heard that the pauper had not been removed from the plaintiff's, but had remained with and been supported by him. *Walker* v. *Southbridge*, 199.

See Domicil.

PLEADING.

I. *Parties to Actions.*

1. The assignor of a chose in action, which has been reassigned to him by his assignee, may bring an action thereon in his own name; although notice of the first assignment was given to the debtor, who promised to pay the debt to the assignee, and no notice was given him of the reassignment; and in such action the defendant may avail himself of the same defence, as if the action were brought by the assignee. *Clark* v. *Parker*, 361.

2. An equitable assignee of a mortgage of personal property may maintain an action of trover for the conversion of such property, in the name of the assignor. *Crain* v. *Paine*, 483.

3. A. conveyed a lot of land to B., who at the same time mortgaged it back; B. quitclaimed to C., who made a sealed lease to D. and E., and their assigns, of the right and privilege of digging a well in the land and of

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conducting water therefrom to their houses; about the same time, A., after entry for foreclosure, but before foreclosing his mortgage, undertook to confirm the lease by an instrument under seal, but not acknowledged, and afterwards quitclaimed the land to C. and F., with a covenant against all claiming under him or his heirs; C. afterwards conveyed all his interest in the land to D., who had meanwhile also become the owner of E.'s house It was held, that D. had sufficient title in the well to enable him to maintain an action on the case for a corruption of the water therein by means of a cesspool sunk in the ground near by, no plea in abatement having been filed to the nonjoinder of E. or of F.; and that it was immaterial whether B. had released his equity of redemption to A. before A. confirmed the lease. *Call* v. *Buttrick*, 345.

See LIMITATIONS, 1.

II. *Declaration, &c.*

4. In declaring on a covenant, the breach may be assigned generally, by negativing the words of the covenant; and, therefore, in an action on the covenant of seizin, where the breach is that there is no such land in existence, as the deed purports to convey, it is not necessary to aver that fact in the declaration. *Bacon* v. *Lincoln*, 210.
5. In a declaration on the covenant for quiet enjoyment implied by law in a lease for years, the covenant is sufficiently described, if it be stated according to the legal effect of the instrument. *Dexter* v. *Manley*, 14.
6. Where a lease for years of a factory, with water power, tools, machinery and apparatus for the manufacture of pails, contained a reservation in favor of the lessor of one room in the factory, and the privilege of running a turning lathe and saw therein during the term; and the lessee brought an action of covenant broken against the lessor, for a misuse of the power reserved to him by the lease; it was held, that the covenant was sufficiently described in the declaration, by an averment that "the defendant covenanted with the plaintiff, that he should have the peaceable and quiet possession and use of the estate and property so leased to him for and during the term aforesaid;" and that a breach was sufficiently assigned by an allegation that the defendant "has used saws and machinery in the room so reserved to himself in such a manner as to deprive the plaintiff of the use of the part of the building and shop so leased to him, and in such a manner that he cannot operate the said machinery and tools, in the manner and for the purpose for which they were designed, to wit, for the manufacture of pails." *Ib.*
7. In an action of trespass, for an injury to the plaintiff's cattle, without taking or converting them, the averment of value is not material. If it were, the want of it could only be taken advantage of by special demurrer, and is therefore cured by the statute of 1836, *c.* 273, § 3, by which special demurrers are abolished. Such defect would also be cured as a circumstantial error, by the Rev. Sts. *c.* 100, § 21. *Bean* v. *Green*, 279.
8. In a complaint to the judge of probate, for embezzlement of the estate of a person deceased, the complainant having described himself as

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"administrator and creditor," and it appearing that he was not entitled to act as administrator, it was held, that the words "administrator and" were material, and could not be rejected as surplusage. *Arnold* v. *Sabin*, 46.

See MALICIOUS PROSECUTION, 1; COSTS, 2.

III. *Specification of Defence.*

See PRACTICE; REPLEVIN, 3; SPECIFICATION OF DEFENCE, 3.

IV. *In Error.*

See. ERROR.

V. *In Criminal Cases.*

See INDICTMENT; COMPLAINT.

POWER.

Where a by-law of a city prohibits the moving of buildings through the public streets, without a license granted by the mayor and aldermen, the board of aldermen cannot delegate to the mayor alone the power to grant such licenses. *Day* v. *Green*, 433.

See BANKRUPT LAW, 1.

PRACTICE.

Where a defendant specifies, among other grounds of defence, a discharge in bankruptcy, the court is bound, under *St.* 1843, *c.* 55, which provides that when an action is discontinued or the plaintiff nonsuited solely in consequence of a plea of bankruptcy, the defendant shall recover no costs against the plaintiff, either to allow the plaintiff to discontinue solely on the ground of the discharge in bankruptcy, or to require the defendant, if he insists on going to trial, to waive his discharge and proceed on his other grounds of defence. *Goward* v. *Dunbar*, 500.

See BURDEN OF PROOF; EXCEPTIONS, 3; INSOLVENCY PROCEEDINGS, 11; JUSTICE OF THE PEACE; NONSUIT; SPECIFICATION OF DEFENCE; TROVER, 2; TRUSTEE PROCESS, 2, 3; WRIT.

PRESUMPTION.

See BURDEN OF PROOF, 1; EVIDENCE, 8; PROMISSORY NOTE, 2, 3.

PRINCIPAL AND AGENT.

An agent, who exceeds his authority, as such, in signing a note which purports to express the promise of his principal, is not personally liable thereon. *Jefts* v. *York*, 371.

See EVIDENCE, 1; INNKEEPER; RAILROAD CORPORATION, 3; REPLEVIN, 1; SCHOOL DISTRICT, 4.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION, 6, 7, 8, 9.

PROBATE COURT.

1. Where a question of fraud arises in the probate court, as incidental to any

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subject of which that court has jurisdiction, the judge must take cognizance of it and try it, in the same manner as any other question of fact. *Wade* v. *Lobdell*, 510. And see *Sever* v. *Russell*, 513.

2. Whether the probate court has jurisdiction of a complaint for embezzlement of the estate of a person deceased, on which no letters testamentary, or letters of administration, have been granted — *quære*. *Arnold* v. *Sabin*, 46.

See GUARDIAN AND WARD; APPEAL, 2.

PROMISSORY NOTE.

1. A promissory note, given to a magistrate for the amount of fines and costs imposed by him upon the maker of the note on a criminal charge, is void, for want of consideration moving from the payee personally, and also because the transaction is in violation of a public duty. *Kingsbury* v. *Ellis*, 578.

2. If the indorsement of a note, payable on time, contains no date, and there is no evidence to show when it was made, the presumption is, that the transfer of the note was made at or soon after its date. *Balch* v. *Onion*, 559.

3. Where the promisor of a note, in the hands of an indorsee, by an indorsement without date, gave the latter a mortgage to secure the payment of all sums of money then due to him from the mortgagor, and it did not appear that any other sum was due than the said note, it was held, that the presumption was, that the transfer of the note took place before the making of the mortgage. *Ib.*

4. The maker of a promissory note, which has been transferred by indorsement before it became due, with a notice to the indorsee, that the maker intended to refuse payment, on the ground, that the note was obtained from him by the fraud of the payee, may prove such fraud in defence to an action against him by the indorsee, and for this purpose may give evidence of the admissions of the payee, whilst he was the holder of the note, and before the indorsement. *Fisher* v. *Leland*, 456.

5. It is no defence to an action by the indorsee of a note against the indorser, that the note was indorsed by the defendant without consideration, for the accommodation of the payee, and delivered to him for the purpose of being used to take up another note of the same parties, but that instead thereof, the payee passed the note to the plaintiff, before its maturity, as collateral security for a preëxisting debt; unless it be shown, also, that the plaintiff knew of the special purpose for which the note was delivered to the payee. *Stoddard* v. *Kimball*, 604.

See INSOLVENCY PROCEEDINGS, 8; JUDGMENT, 2; LIMITATIONS, 1; MORTGAGE, 5; PRINCIPAL AND AGENT; SALE, 2.

RAILROAD.

1 An act of the legislature, which authorizes the construction of a railroad between certain *termini*, without prescribing its precise course and direction, does not *prima facie* confer power to lay out the road on and along

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an existing public highway; but it is competent to the legislature to grant such authority, either by express words, or by necessary implication; and such implication may result either from the language of the act, or from its being shown, by an application of the act to the subject matter, that the railroad cannot, by reasonable intendment, be laid in any other line. *Springfield* v. *Connecticut River Railroad*, 63.

2. The fourth section of the act of 1849, c. 222, which gives county commissioners jurisdiction of all questions touching obstructions to highways by railroads, if it does not relate exclusively to the raising or lowering of such ways when crossed by a railroad, which the court did not decide, has no effect to deprive this court of their jurisdiction of a case commenced therein before the passing of the act. *Ib.*

RAILROAD CORPORATION.

1. The statute of 1840, c. 85, making the proprietors of railroads responsible for injuries by fire communicated from their locomotive engines, applies to railroads established before as well as since its passage; and extends as well to estates, a part of which is conveyed by the owner, as to those of which a part is taken by authority of law, for the purposes of a railroad. *Lyman* v. *Boston & Worcester Railroad*, 288.

2. The proprietors of a railroad, as passenger carriers, are bound to the most exact care and diligence, not only in the management of their trains and cars, but also in the structure and care of their track, and in all the subsidiary arrangements necessary to the safety of passengers. *M'Elroy* v. *Nashua & Lowell Railroad*, 400.

3. A railroad company are responsible for an injury, sustained by a passenger in their cars, in consequence of the careless management of a switch, by which another railroad connects with and enters upon their road, although the switch is provided by the proprietors of the other road, and attended by one of their servants, at their expense. *Ib.*

See Equity, 2; Railroad; Railroad Damages; Way, 4.

RAILROAD DAMAGES.

1. In estimating the damages for land taken for a highway or railroad, any direct and peculiar benefit or increase of value, accruing therefrom to land of the same owner adjoining or connected with the land taken, and forming part of the same parcel or tract, is to be considered by the jury and allowed by way of set-off; but not any general benefit or increase of value received by such land in common with other lands in the neighborhood nor any benefit to other land of the same owner, though in the same town. *Meacham* v. *Fitchburg Railroad*, 291.

2. The time, at and from which the benefit accruing to the owner of land taken for a highway or railroad, is to be estimated, in assessing his damages for such taking, is that of the actual location. *Ib.*

3. On the trial of a petition before a sheriff's jury, for an assessment of damages for land taken for a railroad, evidence is not admissible to show the price paid by the respondents, for land adjoining the land in question,

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under an award of arbitrators mutually agreed upon to esumate the same. *White* v. *Fitchburg Railroad*, 440.

1. Where the land of one deceased is taken for a railroad, the heir and not the administrator is entitled to the damages for such taking, and to prosecute for the recovery thereof, although the administrator has previously represented the estate to be insolvent, and afterwards obtained a license to sell the intestate's real estate for the payment of debts. *Boynton* v. *Peterborough & Shirley Railroad*, 467.

See SHERIFF'S JURY.

RATIFICATION.

See SCHOOL DISTRICT, 4.

REAL ACTION.

See JUDGMENT, 1.

REBUTTER.

See DISSEIZIN.

RECEIPT.

1. Taken by a guardian of his ward. See GUARDIAN AND WARD.
2. Given for goods attached. See ATTACHMENT, 4, 5; MORTGAGE, 6.

RECORD.

See JUSTICE OF THE PEACE, 2.

RELEASE.

See WITNESS, 3.

RELIGIOUS SOCIETIES.

See PARISHES AND RELIGIOUS SOCIETIES.

RENT.

See BANKRUPTCY; LEASE; LANDLORD AND TENANT, 2, 3, 4, 5.

REPLEVIN.

1. A party residing abroad having contracted with a manufacturer in this state for the building of certain machines, which were to be delivered to such party's general agent here, by whom they were to be received and shipped, and paid for out of funds furnished him for the purpose, a part of the machinery was accordingly manufactured and delivered to the agent, and the whole thereupon paid for by him; it was held, that the agent did not thereby acquire any such property in the articles not delivered, as would entitle him to maintain an action of replevin therefor against the manufacturer. *Dixon* v. *Hancock*, 96.
2. If tenants in common of personal property make separate conveyances thereof to the same purchaser, one of which conveyances is fraudulent

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and void as against creditors, the purchaser cannot maintain replevin for such property against an officer attaching the same as the property of the vendors. *Kimball* v. *Thompson*, 441.

3. The defendant in an action of replevin, since the Rev. Sts. c. 113, § 28, directing that the general issue in replevin shall be joined on the plea of not guilty, and the *St.* 1836, c. 273, § 1, by which special pleas in bar are prohibited, may, under the general issue of not guilty, prove that the property of the goods alleged to be taken is in himself. *Miller* v. *Sleeper*, 369.
4. If a debtor, whose goods are attached and replevied, takes advantage of the insolvent law, and the defendant in replevin obtains a verdict, he will be entitled, notwithstanding the insolvency, to judgment for a return; and will thereupon be bound to deliver over the property to the assignee of the insolvent, for the benefit of his general creditors. *Kimball* v. *Thompson*, 441.

See WITNESS, 2.

RESERVATION.

See CONDITION, 2; DEED, 8; LEASE, 2; LANDLORD AND TENANT, 2.

RIGHT OF RETENTION.

See SALE, 2.

RIGHT TO OPEN AND CLOSE.

See BURDEN OF PROOF, 2.

SALE.

1. Where goods are sold and delivered under an agreement that until paid for they shall remain the property of the seller, who shall have the right in the mean time to take them away whenever he pleases, the seller has an implied irrevocable license to enter upon the buyer's land and take the property, without a previous demand, at any time before the whole of the price is paid. *Heath* v. *Randall*, 195.
2. The owner of a large quantity of wood, which was lying in a pile on his own land, having sold a portion of the same, and measured off and marked the part sold, with an agreement that the purchaser might remove it within a year, gave the purchaser a bill of sale of the wood, and received from him his promissory note for the price payable in six months, before the expiration of which time the purchaser became insolvent: It was held, that the vendor might retain the wood so sold against the assignee in insolvency of the purchaser, until the price thereof was paid or tendered to him; and that the right of the vendor in this respect was not varied by the giving of the note for the purchase money, so long as the note remained in the hands of the vendor not negotiated, but ready to be delivered to the promisor or his assignee, on the discharge of the lien; or by the giving up of the bill of sale by the purchaser to the vendor, at his request, after the insolvency of the former; or by a sale of a portion of the wood by the

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vendor, after the expiration of the year within which it was to be removed by the purchaser. *Arnold* v. *Delano*, 33.
3. Sale by trustee to himself. See TRUSTEE.
4. Of real estate for non-payment of taxes. See TAX, 3, 4, 5.
5. Of bankrupt's real estate under order of court. See BANKRUPT LAW, 1.
6. On execution. See EXECUTION, 5.

See BURDEN OF PROOF, 1; DAMAGES, 2; STATUTE OF FRAUDS, 2.

SAVINGS BANKS AND INSTITUTIONS FOR SAVINGS.

See TRUSTEE PROCESS, 6.

SCHOOL COMMITTEE.

The power conferred on school committees, by *St.* 1838, *c.* 105, § 2, to "select and contract with the teachers for the town and district schools," includes the power to fix the compensation to be paid them, and to bind the town to pay the same. *Batchelder* v. *Salem*, 599.

SCHOOL DISTRICT.

1. The inhabitants of a town are not authorized by law to form a portion thereof into a school district, leaving all the residue of the town not districted. *Fry* v. *School District in Athol*, 250.
2. Where the inhabitants of a town, in the exercise of the power conferred upon them by the act of 1789, *c.* 19, § 2, to determine and define the limits of school districts, established the several districts therein by an enumeration of the inhabitants belonging to each, but without any geographical or territorial division, and the districts so established were in fact in existence, when the act of 1817, *c.* 14, was passed, by which school districts were made bodies corporate for certain purposes; it was held, that such districts were not thereby established as legal districts. *Ib.*
3. The power conferred by law (*St.* 1789, *c.* 19, § 2; Rev. Sts. *c.* 23, § 24,) on towns, to determine and define the limits of school districts, can only be executed by a geographical or territorial division. *Ib.* And see *Bassett* v. *Porter*, 487.
4. Where a school district appointed three persons a committee to build a school-house, two of whom, the third refusing to act, built a house, where all the schools of the district were afterwards kept, and all meetings of the inhabitants of the district held, and on which the notices of such meetings by vote of the district were posted; it was held, that on these facts a jury were warranted in finding such a ratification and acceptance by the district of the doings of the two acting members of the committee, as would render the district liable to pay them for the house. *Fisher* v. *School District in Attleborough*, 494.

See ASSESSORS, EVIDENCE, 6.

SCIRE FACIAS.

Scire facias is a proper process to enforce payment of arrears of alimony *Morton* v. *Morton*, 518.

See TRUSTEE PROCESS, 9, 10.

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SEEKONK.

See PAUPER, 3.

SEIZIN.

See COVENANT.

SETTLEMENT.

See PAUPER.

SHERIFF.

See OFFICER; SHERIFF'S JURY, 2.

SHERIFF'S JURY.

1. The "three nearest towns not interested," from which jurors are to be taken to estimate the damages caused by the laying out of a highway or railroad, are the three towns nearest to and exclusive of the town in which the land lies, over which the highway or railroad is laid. *Meacham* v. *Fitchburg Railroad*, 291.
2. A sheriff's jury, to assess damages for land taken for a highway or railroad, may be summoned by the constables of the several towns from whence they are taken, or partly by such constables, and partly by the deputy sheriff by whom the warrant is executed. *Ib.*
3. The mortgagee of land taken for a railroad need not be made a party to proceedings by the mortgagor for the assessment of damages, provided he gives his assent thereto by a writing filed in the case. *Ib.*
4. The want of proper parties, to a proceeding before a sheriff's jury, for the assessment of damages for land taken for a highway or railroad, must be objected before the commissioners, upon the application for such jury. *Ib.*
5. On an appeal to this court from a judgment of the court of common pleas, accepting the verdict of a sheriff's jury, empannelled to revise the estimate of county commissioners, on an application for damages occasioned by the laying out of a railroad, it cannot be objected that the commissioners had no jurisdiction, by reason of the parties having agreed to refer the damages to arbitration; but such objection, if relied upon, must be taken before the commissioners as a ground for not ordering a jury. *Field* v. *Vermont & Massachusetts Railroad*, 150.

See COSTS, 3.

SPECIFICATION OF DEFENCE.

A specification of defence, in the court of common pleas, cannot be excepted to for generality, after issue joined. *Blaisdell* v. *Gladwin*, 373.

See PRACTICE.

SPECIFIC PERFORMANCE.

See EQUITY, 1.

SPIRITOUS LIQUOR.

It is no justification for the sale of spiritous liquor without license, that, at

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the time of such sale, there was no druggist or other person licensed to sell spiritous liquors within the county; that the sale was made upon the order or prescription of a physician; and that the spirit thus obtained was necessary for the buyer's use, either as a medicine, or for the preservation of his health. *Commonwealth* v. *Sloan*, 52.

See INDICTMENT, 1, 2.

STATUTE.

Statutes are to be construed according to the intention of the makers, if this can be ascertained with reasonable certainty; although such construction may seem contrary to the ordinary meaning of the letter of the statute. *Staniels* v. *Raymond*, 316.

See BANKRUPT LAW, 2; EMINENT DOMAIN; INSOLVENCY PROCEEDINGS, 14; MILL, 1; RAILROAD; RAILROAD CORPORATION, 1; SCHOOL DISTRICT, 2; TURNPIKE CORPORATION.

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See SALE, 2.

STREET.

See ESTOPPEL; POWER; WAY, 1, 2.

SUPREME JUDICIAL COURT.

Jurisdiction of, in Equity. See EQUITY.

TAX.

1. The owner of goods, wares and merchandise, living in one town, and doing business in another, where he has a privilege in a counting-room, and has goods stored, but does not otherwise hire or occupy any store, shop, or wharf, is not liable, within the provisions of the Rev. Sts. c. 7, § 10, cl. 1, and St. 1839, c. 139, § 1, to taxation for such goods, in the town where he so does his business. *Huckins* v. *Boston*, 543.
2. In December, 1845, O. S. died, leaving a will, in which A. S. was named as executor, by whom the will was presented for probate; but the validity thereof being controverted, A. S., in December, 1846, was appointed special administrator; and the validity of the will being established in August, 1847, A. S. was appointed executor under the same: The assessors of the town of H., in which the deceased last dwelt, having assessed a tax to A. S., in May, 1846, for the estate of O. S. in his hands as executor, it was held, that under the peculiar circumstances of the case, the same was rightly assessed. *Smith* v. *Northampton Bank*, 1.

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3. The third section of *St.* 1848, *c.* 166, requiring that the advertisement of the time and place of sale of real estate taken for taxes, shall "in addition to the provisions contained in Rev. Sts. *c.* 8, § 25, contain a substantially accurate description of the rights, lots or divisions, of the real estate to be sold," is only explanatory of the statute referred to, under which a description, though not expressly required, was necessary, by which the owner might know what rights, lots or divisions were to be sold. *Farnum* v. *Buffum*, 260.

4 Where, in an advertisement of the time and place of sale of real estate taken for taxes, estates were described in these terms: "M. B. house and land," and "L. E. house, barn and one hundred and fifteen acres of land," L. E. being a tenant of M. B., but H. M. having at the time taken possession of the estates under a mortgage from M. B. to him; it was held, that H. M. was the owner, and that his name not being stated in the advertisement, there was no sufficient description within the Rev. Sts. *c.* 8, § 25, providing that where the name of the owner is not known to the collector, the advertisement shall state the amount of the taxes on the several rights, lots or divisions of the real estate to be sold. *Ib.*

5. In proving the posting of a notice, by the collector, of the time and place of sale of real estate taken for taxes, in some convenient and public place within his precinct, three weeks before the time of sale, as required by the Rev. Sts. *c.* 8, § 27, the time when such notice was posted must be fixed with certainty, and its contents must be sufficiently shown, in order to identify it with the notice required to be published by the twenty-fourth section of the same chapter. *Ib.*

See Assessors; Bank; Collector; Pauper, 4, 6.

TENANT AT SUFFERANCE.

See Landlord and Tenant, 5.

TENANTS IN COMMON.

Whether, in this state, joint disseizors, entering without title, or color of title, are joint tenants, or tenants in common — *quære*. *Fowler* v. *Thayer*, 111.

See Assault and Battery; Execution, 4; Mortgage, 3; Replevin, 2.

TIME.

Under an agreement for a conveyance of a lot of land, on payment of the purchase money, a certain amount of which was to be paid annually, "the time commencing at the date of the agreement," the day of the date is to be excluded in the computation; although the agreement provides that the purchaser shall in the mean time have the use of the land. *Farwell* v. *Rogers*, 460.

See Execution, 7; Justice of the Peace, 1; Way, 5.

TOLLS.

See Assumpsit, 1; Corporation; Turnpike Corporation.

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TOWN.

1. A town, which has been compelled to pay damages for an injury from a defect in a highway, occasioned by a nuisance placed therein by an individual, may recover of the latter the damages so paid, to the amount of single damages only, in an action on the case. *Lowell* v. *Short*, 275.
2. Liability of, for defects in highway. See ACTION, 2; LORD'S DAY, 2; WAY.

See BILL IN EQUITY; EQUITY, 2; LANDLORD AND TENANT, 7.

TRESPASS.

Trespass lies against an officer for taking goods exempt by law from attachment. *Bean* v. *Hubbard*, 85. And see *Davlin* v. *Stone*, 359.

See BURDEN OF PROOF, 2; PLEADING, 7.

TROVER.

1. Since the *St.* of 1839, *c.* 151, § 4, providing that "in all actions on the case, it shall be no objection to maintaining such actions, that but for this act the form thereof should have been trespass," trover lies for attaching goods exempt by law from attachment. *Davlin* v. *Stone*, 359.
2. In an action of trover against two, one of whom is defaulted, and the other found guilty by the jury, there is but one assessment of damages, and a joint judgment. *Gerrish* v. *Cummings*, 391.

See WITNESS, 4.

TRUSTEE.

If the rule of law, that a trustee to sell cannot himself become the purchaser, is applicable to the case of an administrator, who obtains a license to sell the real estate of his intestate, and becomes the purchaser thereof through the agency of a third person (which the court did not decide), such purchase is not void, but voidable only by creditors, or heirs, or other persons interested, while the estate remains in the hands of such administrator; but, if he sell and convey the same to a *bona fide* purchaser, for a valuable consideration, and without notice, such purchaser will obtain a good title. *Robbins* v. *Bates*, 104.

TRUSTEE PROCESS.

1. Where the only trustee named in a trustee process is an incorporated banking company, the action must be brought in the county in which such company have their established or usual place of business. *Lewis* v. *Denney*, 588.
2. If a trustee process is brought in the wrong county, as to the trustee, the action cannot be maintained upon a discontinuance against the trustee. *Ib.*
3. A trustee process, brought in a county in which no one of the trustees dwells, will be dismissed on motion of a trustee named therein or of the principal defendant. *Ib.*
4. Articles exempted from execution by the Rev. Sts. *c.* 97, § 22, are not liable to attachment by the trustee process. *Staniels* v. *Raymond*, 314.

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5. One to whom an article is delivered on trial, in pursuance of a negotiation for a sale and purchase, who redelivers the article to the owner, within the time limited for the trial, (whether before or after the service of process upon him) with notice that he does not intend to complete the purchase, but is left in possession of the article, is not liable therefor, as the trustee of the owner. *Ib.*

6. Money belonging to the L. I. B. Society was placed by their president in the hands of D. C. for the purpose of being deposited for the society in an institution for savings; D. C. accordingly deposited it, the entry thereof in the books of the institution and in the deposit book given to D. C. being, "D. C. in trust for the L. I. B. Society;" subsequently other sums of money belonging to the society were deposited by another individual, in whose hands they had been placed for that purpose, and were entered, in the same form, in the books of the institution, and in the deposit book given to D. C. It was held, that the money thus deposited was the money of the L. I. B. Society, and that the institution for savings was chargeable therefor as their trustee; although it appeared that the treasurer of the institution supposed and believed, that the deposits were made with the understanding that they were wholly under D. C.'s control, and subject only to his order, and that the institution had invariably held itself answerable to the individual depositing the money. *Raynes* v. *Lowell Irish Benevolent Society*, 343.

7. If several persons are summoned as trustees, on the ground of a joint liability, and one of them answers for himself and the others, jointly, and states the joint account between the parties, the answer is *prima facie* sufficient; and if the plaintiff, for any cause, desires to have the sworn answers of all, he should object to the answer of a single one at the time it is made, and move the court to require the others also to answer. *Hennessey* v. *Farrell*, 267.

8. A supposed trustee, in addition to his sworn answers and statements, may allege and prove any other fact not stated or denied by him, that may be material to the decision of the question of his liability. *Staniels* v. *Raymond*, 314.

9. A writ of *scire facias* cannot be lawfully issued, under the Rev. Sts. c. 109, § 38, against a trustee, before his default is shown by the officer's return on the execution against him; but a return of the execution, before the return day, will not authorize the issuing of such writ. *Adams* v. *Cummiskey*, 420.

10. The provision in the Rev. Sts. c. 109, § 41, where a trustee answers anew to a *scire facias* against him, that, "Upon the whole matter appearing upon such examination and trial, the court shall render such judgment, as law and justice shall require," extends as well to the costs, as to the charging or discharging of the trustee; and where a trustee, on such examination, was discharged by reason of a mistake, wholly attributable to himself, in his answer to the original suit, he was adjudged to pay costs to the plaintiff, and to recover none for himself. *Thompson* v. *Lowell Machine Shop*, 431.

See ASSIGNMENT, 2; CONTRACT, 3; INSOLVENCY PROCEEDINGS, 1.

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TURNPIKE CORPORATION.

The right of a turnpike corporation, established since the *St.* 1804, *c.* 125, and before the revised statutes, to maintain an action for a penalty in the name of their treasurer, against any person passing a turnpike gate of such corporation without paying toll, is taken away by the revised stat utes, *c.* 39, §§ 32, 94, and *c.* 133, § 14. *Gilmore* v. *Skiff*, 503.

UNLAWFUL EXHIBITION.

See INDICTMENT, 3, 4, 5.

USE AND OCCUPATION.

See LANDLORD AND TENANT, 3, 4.

VENDOR AND PURCHASER.

See EQUITY, 1; SALE, 1, 2.

VERDICT.

See ERROR; MILL, 2.

VOID AND VOIDABLE.

See TRUSTEE.

VOTE.

Of Toll Bridge Corporation. See CORPORATION.

WARRANTY.

On Sale. See DAMAGES, 2.
Covenant of. See WITNESS, 3.

WAY.

1. The proprietors of certain real estate in the city of L. laid out and con structed a street through the same, in the manner in which roads are usually built, with a carriage way in the centre, of the ordinary width, after which the street was and continued to be used by the public, without obstruction or objection: They afterwards conveyed a portion of the land including a part of that over which the street was laid out, to the defendants, with a provision in the deed, that the street should be forever maintained as a road, for the common use of the parties to the conveyance, their successors and assigns, the grantees severally keeping in repair those parts which passed over their respective estates: The proprietors subsequently conveyed to the plaintiff a lot of land bounding on the street and so described, with all the privileges and appurtenances thereto belonging; and then sold at auction all their remaining lands on said street, together with other lands, declaring in the printed conditions of sale, that all the streets mentioned therein (including the street in question) should be reserved and kept open, for the benefit of the abuttors; but that any of them which were not graded might be altered or discontinued, with the

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consent of the abuttors thereon: And the city afterwards laid out that part of the street on which the plaintiff's lot was bounded as a public highway: It was held, that no intention on the part of the proprietors, to dedicate the street in question to public use, could be inferred from these facts, and that the plaintiff had a right of way in that part of the street not laid out by the city, for an obstruction of which by the defendants, he might maintain an action on the case. *Bowers* v. *Suffolk Manufacturing Company*, 332.

2. It seems, that in this commonwealth, and especially since the *St.* 1846, *c.* 203, no public way can be established by dedication merely, and without the assent, express or implied, of the city or town, which will be bound by law to keep the same in repair. *Ib.*

3. Where a traveller on a highway, while in the exercise of ordinary care, received an injury in consequence of driving his wagon against a post; and it appeared that the line of the highway was not indicated by any visible objects; that the post, which occasioned the injury, was near the true line of the highway, and within the limits of the general course and direction of the travel, and where travellers were accustomed to pass, and rendered the travelling dangerous; that there was nothing to indicate that the post was not within the way intended for public travel; and that the town, though they had reasonable notice of the course of the travel, and that the post was dangerous to travellers, suffered it to remain an unreasonable time: It was held, that the town were liable, under the statute, for the injury sustained by the plaintiff. *Coggswell* v. *Lexington*, 307.

4. If the proprietors of a railroad, acting within the scope of their lawful authority, construct a cattle guard in their road, at a place where it crosses a highway on the same level; and the town erect and maintain a sufficient and proper barrier against such cattle guard, up to the railroad, and as far as can be done without impeding the passing of cars on the same; the town are not responsible for an injury sustained by a traveller on the highway, in consequence of his falling into the cattle guard, without any fault or neglect on his part. *Jones* v. *Waltham*, 299.

5. In computing the time of twenty-four hours, during which a defect in a highway must have existed, in order to render the town liable for an injury occasioned thereby, within the Rev. Sts. *c.* 25, § 22, the time of Lord's day is to be included. *Flagg* v. *Millbury*, 242.

6. In an action against a town for an injury occasioned by a defect in a highway, the question whether or not there was negligence, or want of ordinary care, on the part of the plaintiff, is to be determined by the jury, under all the circumstances of the case. *Bigelow* v. *Rutland*, 247.

7. In the trial of an action on the case against a city, for an injury occasioned by a defect in a street therein, the presiding judge having instructed the jury, among other things, that what was a defect in a highway, which would render a town or city liable for an injury occasioned thereby, was a "practical question, to be determined by the jury in view of the circumstances of each particular case," added, by way of illustration, "that a different state of repair would be required in a city where a large amount and variety of travel was constantly passing, than in a country place where

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the state of things in this respect was different." It was held, that, understanding the term "city" to be used to designate a closely-built and thickly-settled place, with a great amount and variety of travel, as distinguished from a place of an opposite character, through which there was little travel, the illustration was a proper comment on the law, and not likely to mislead the jury. *Fitz* v. *Boston*, 365.

See ACTION, 2; EQUITY, 2; ESTOPPEL; LANDLORD AND TENANT, 7; LORD'S DAY, 2; POWER; RAILROAD; TOWN; TURNPIKE CORPORATION.

WELL.

See PLEADING, 3.

WIDOW.

See DOWER.

WILL.

The act of 1842, *c.* 74, does not enable a married woman to make a devise of her real estate to her husband. WILDE and DEWEY, Justices, dissenting. *Morse* v. *Thompson*, 562. [But see *St.* 1850, *c.* 200.]

See DOWER, 4, 5; EVIDENCE, 8.

WITNESS.

1 When several actions are tried together, which it is in the discretion of the judge to direct, the testimony of a witness who is competent in one is not to be excluded, because it is inadmissible in the others, and may possibly have some effect on the decision of them; but, in such case, the jury are to be directed to confine the testimony of the witness to the case in which he is competent. *Kimball* v. *Thompson*, 441.

2. Where several actions of replevin are tried together before the same jury, by order of the judge, a surety in one of the replevin bonds is a competent witness to testify in the cases in which he is not interested, in the same manner as if the actions had been separately tried; and the party offering such surety as a witness cannot be required, before calling him, to substitute a new surety in his place on the replevin bond. *Ib.*

3. The grantor of land with warranty is a competent witness for the grantee, in a real action against him to recover the land, upon being released by the grantee from all liability on his covenant; the grantee not having previously conveyed or incumbered the estate. *Field* v. *Snell*, 504.

4. Where one of two defendants, in an action of trover, is defaulted, he is incompetent as a witness on the trial for the other, on the ground of interest, even though called to testify to matters not connected with the question of damages. *Gerrish* v. *Cummings*, 391.

5. A witness, who is admissible at all, is liable to be examined upon all matters pertinent to the issue on trial; and one, who is incompetent by reason of interest in the event of the suit, cannot be made competent by being called to testify only to a fact in which he is not interested, and not to the question of damages. *Ib.*

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6. A witness, on cross examination, cannot be asked a question, otherwise irrelevant, for the purpose of testing his moral sense. *Commonwealth* v *Shaw*, 593.

7. It is the privilege of a witness, and not the right of the party against whom he is called, to object to his giving evidence to criminate himself; and it is not the duty of the judge, upon the interposition of such party and independent of any objection of the witness, to inform the latter of the rule of law that he is not bound to criminate himself. *Commonwealth* v. *Shaw*, 594.

8. The question of a witness's reputation for truth and veracity is one of fact to be tried by the jury; and it is not competent for the court to institute or allow a preliminary examination of the impeaching witnesses, as to their knowledge and means of knowledge of the reputation of the witness sought to be impeached, and, thereupon, to receive or reject their testimony, according as the court are satisfied, or not, that they have the requisite knowledge to enable them to testify to the fact in question. *Bates* v. *Barber*, 107.

9. An impeaching witness may be asked, on cross examination, to state the names of all persons, whom he has heard speak against the reputation of the witness impeached. *Ib.*

10. Where a witness is called to testify against the reputation of another witness for truth and veracity, he can only be inquired of as to what he has heard, and cannot be asked, "Whether, from the treatment and conduct of the community generally towards the witness sought to be impeached, he knows enough about his general character to say what it is for truth and veracity." *Ib.*

11. In order to enable the party aggrieved to maintain an action on the case to recover damages against a witness for failing to attend and testify, the plaintiff must prove that the witness was duly summoned, and that his fees for travel and attendance as such were duly paid or tendered to him, according to the requisitions of the Rev. Sts. *c.* 94, § 3; and it is not sufficient, in such case, to prove a waiver, on the part of the witness, of his right to service and fees. *Robinson* v. *Trull*, 249.

See ARBITRAMENT, &c., 1; EVIDENCE, 11, 12; EXCEPTIONS, 2, 5.

WORK AND LABOR.

See ASSUMPSIT, 2; CONTRACT, 3.

WRIT.

The writ and process, to which alone the power of quashing is applicable, may be quashed for defects therein, but not for defects in the declaration *Bean* v. *Green*, 279.

WRIT OF ENTRY.

See DISSEIZIN.

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